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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1902~~ 1903.

No ~~447~~ 134.

COSMOPOLITAN MINING COMPANY, PLAINTIFF IN ERROR,

vs.

THOMAS F. WALSH.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

FILED OCTOBER 2, 1902.

(18,675.)

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1 *Pleas in the Circuit Court of the United States for the District of Colorado, Sitting at Denver.*

Be it remembered, that heretofore and on, to wit, the 3rd day of November, A. D. 1900, came the Cosmopolitan Mining Company, by Messrs. Perry & Bliss, and George C. Preston, its attorneys, and filed in said court its complaint; and sued out of and under the seal of said court a writ of summons against Thomas F. Walsh.

And the said complaint is in words and figures as follows, to wit:

UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

In the Circuit Court of the United States for the District of Colorado.

COSMOPOLITAN MINING COMPANY, a Corporation, Plaintiff,
vs.
THOMAS F. WALSH, Defendant. } Complaint.

Plaintiff complains of the defendant and for a cause of action it alleges:

2 1. That the plaintiff, Cosmopolitan Mining Company, is a corporation duly organized and existing under and by virtue of the laws of the State of Maine, and is a resident and citizen of the said State of Maine, and the defendant, Thomas F. Walsh, is a resident and citizen of the State of Colorado.

2. That the value of the property involved in this controversy exceeds the sum of two thousand dollars ($2,000.00) exclusive of interest and costs.

3. That on the twenty-fifth day of May, A. D. 1896, the plaintiff was seized in fee and possessed and entitled to the possession of each and all of those certain lode mining claims, mill sites and tracts of land described as follows, viz:

The Hidden Treasure Lode mining claim, U. S. survey No. 548–A; the Hidden Treasure mill site, U. S. mineral survey No. 548–B; the Yellow Rose Lode mining claim U. S. survey No. 576–A; the Yellow Rose mill site U. S. mineral survey No. 576–B; the Emily Lode mining claim, U. S. mineral survey No. 547–A; the Emily mill site, U. S. survey No. 547–B, the Crusader Lode mining claim, U. S. mineral survey No. 575; the Talisman Lode mining claim, U. S. mineral survey, No. 545; the Norma Lode mining claim, U. S. mineral survey No. 546–A; the Norma mill site U. S. mineral survey No. 546–B; the Gertrude Lode mining claim, U. S. mineral survey No. 1548–A, and the Gertrude mill site, U. S. mineral
3 survey No. 1548–B, all situate in Sneffles mining district in the county of Ouray and State of Colorado.

4. That the plaintiff being so possessed, the defendant afterward, to wit, on the twenty-fifth day of May, A. D. 1896, entered into pos-

session of the said demanded premises and ousted the plaintiff therefrom, and now unlawfully and wrongfully withholds the possession thereof from the plaintiff, to its damage in the sum of one hundred thousand dollars ($100,000).

Wherefore plaintiff demands judgment against the defendant for the possession of each of above-described mining claims and premises, and for one hundred thousand dollars ($100,000) damages for withholding possession thereto, and for the costs of this action.

COSMOPOLITAN MINING COMPANY,
By PERRY AND BLISS,
GEORGE C. PRESTON, *Its Attorneys.*

HURLBURT, JONES AND CABOT, *Of Counsel.*

(Endorsed:) 4107.—United States of America.—In the circuit court of U. S., district of Colorado.—Cosmopolitan Mining Company, a corporation, plaintiff *vs.* Thomas F. Walsh, defendant.—Complaint. Filed Nov. 3, 1900, Robert Bailey, clerk.

4 UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

In the United States Circuit Court for the District of Colorado.

COSMOPOLITAN MINING COMPANY, Plaintiff, *versus* THOMAS F. WALSH, Defendant.	Complaint Filed in the Clerk's Office This 3rd Day of November, A. D. 1900.

The President of the United States of America to the above-named defendant, Greeting:

You are hereby notified that an action has been brought in said court, by Cosmopolitan Mining Company, plaintiff, against you as defendant, to recover the possession of the Hidden Treasure Lode mining claim, the Hidden Treasure mill site, the Yellow Rose Lode mining claim, the Yellow Rose mill site, the Emily Lode mining claim, the Emily mill site, the Crusader Lode mining claim, the Talisman Lode mining claim, the Norma Lode mining claim, the Norma mill site, the Gertrude Lode mining claim, the Gertrude mill site, all situate in Sneffles mining district, Ouray county, Colorado, for the sum of $100,000 as damages for unlawfully withholding possession thereof, and for the costs of suit, as more fully set forth and described in the complaint filed herein and to which reference is here made.

5 You are hereby required to appear and demur or answer to the complaint filed in said action in said court, within ten days (exclusive of the day of service) after this summons shall be served on you, if such service shall be made within the county of Arapahoe; otherwise within forty days from the day of service; and if you fail so to do, the said plaintiff will take judgment against you by default, according to the prayer of the said complaint.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States and the seal of the said circuit court, at the city of Denver, in said district, this 3rd
[SEAL.] day of November, A. D. 1900, and of the Independence of the United States the 125th year.

ROBERT BAILEY, *Clerk.*

Proof of Service.

UNITED STATES OF AMERICA, *District of Colorado,* } ss:

DENVER, COLORADO, *Nov.* 20, *A. D.* 1900.

I hereby certify that I received the within writ on the 20 day of Nov. A. D. 1901, and that I have personally served the same upon the said defendant Thomas F. Walsh by delivering to Mrs. Thomas F. Walsh, the wife of the defendant a true copy of this writ,
6 personally, at the time and place as follows: At room 440 in the Brown Palace hotel, Denver, county of Arapahoe on the 20 day of Nov. A. D. 1900.

DEWEY C. BAILEY, *Marshal,*
By MELVIN EDWARDS,
Deputy Marshal.

(Endorsed:) No. 4107.—United States circuit court, for the district of Colorado.—Cosmopolitan Mining Company, plaintiff *versus* Thomas F. Walsh, defendant.—Summons.—George C. Preston of Denver, attorney for plaintiff.—Filed Nov. 21, 1900. Robert Bailey, clerk.

UNITED STATES OF AMERICA, *District of Colorado,* } ss:

In the Circuit Court of the United States within and for the District of Colorado.

THE COSMOPOLITAN MINING COMPANY, a Corporation, Plaintiff,
vs.
THOMAS F. WALSH, Defendant. } Demurrer.

Comes now the defendant in the above-entitled action and demurs to the complaint heretofore filed herein, and for grounds thereof shows unto this honorable court:

7 1. That the said complaint does not state facts sufficient to constitute a cause of action.

2. That the said complaint is ambiguous, unintelligible, and uncertain in this, to wit: That it fails in paragraph three of said complaint to describe the property which it alleges it was the owner of

on the twenty-fifth day of May, A. D. 1896, or with certainty to set out the boundaries and a description of such property.

CHAS. J. HUGHES, JR.,
GERALD HUGHES,
Attorneys for the Defendant.

(Endorsed:) No. 4107, Div. —. In U. S. circuit court.—The Cosmopolitan Mining Company, a corporation *vs.* Thomas F. Walsh.—Demurrer to the complaint.—Filed, Nov. 30, 1900. Robert Bailey, clerk.—Charles J. Hughes, Jr. and Gerald Hughes, attorneys for defendant.

Twenty-sixth day, November term, Saturday, December 8th, A. D., 1900.

Present: The Honorable Moses Hallett, district judge, and the Honorable John A. Riner, district judge of the district of Wyoming, assigned to the district of Colorado, and other officers as noted on the sixth day of November last past. And before the Hon-
8 orable Moses Hallett, district judge, the following proceedings were had.

COSMOPOLITAN MINING COMPANY *vs.* THOMAS F. WALSH. } 4107. Action for Possession of Specific Real Property and for Damages.

At this day comes the plaintiff by George C. Preston, Esquire, its attorney, and the defendant by Gerald Hughes, Esquire, his attorney, also comes.

And the demurrer to the complaint herein coming on now to be heard is argued by counsel and the court having considered the matter and being now fully advised in the premises it seemeth to the court now here that the complaint herein is sufficient in law to be answered unto and so the demurrer is hereby overruled.

And thereupon it is ordered by the court that the defendant answer the complaint herein within twenty (20) days from this day.

UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

In the Circuit Court of the United States within and for the District of Colorado.

COSMOPOLITAN MINING COMPANY, a Corporation, Plaintiff,
9 *vs.*
THOMAS F. WALSH, Defendant. } Answer.

Comes now the defendant and answering the complaint of the plaintiff herein:

I. For a first defense thereto the defendant denies each and every allegation in said complaint contained.

II. For a second defense and answer to said complaint the de-

fendant alleges that during the months of April and May, A. D. 1895, the A. W. Begole Mercantile Company, John Ashenfelter, P. H. Fennell, and William C. Fulton, commenced their certain action in the county court of Ouray county against the plaintiff herein, and levied attachments upon the property described and set forth in paragraph 3 of said complaint and in said actions judgments were, after a full compliance with all the steps and acts necessary in such cases, as provided in and by the statutes of the State of Colorado with reference thereto, regularly and legally rendered; that on the twenty-third day of July, A. D. 1895, special execution was duly issued out of said county court in the cause in which The A. W. Begole Mercantile Company was plaintiff and The Cosmopolitan Mining Company was defendant, and that thereafter the property, as described and set out in paragraph 3 of the complaint herein, was duly levied upon, advertised, and sold by the then sheriff of Ouray county, to one J. C. Marsh as trustee, and a certificate of purchase was
10 duly and regularly issued to said Marsh in accordance with the statute in such case made and provided.

Second. That afterwards said Marsh, for a valuable consideration, duly assigned said certificate of purchase to Stephen A. Osborn and on May 25, A. D. 1896, the time of redemption having expired, the then sheriff of Ouray county duly executed and delivered to Stephen A. Osborn a sheriff's deed for the premises described in paragraph 3 of the complaint herein.

Third. That on June 16, 1896, the defendant purchased from said Stephen A. Osborn, for a good and valuable consideration, to wit the sum of ten thousand dollars all of the premises, as contained in said sheriff's deed, and being all of the property alleged to be the property of the plaintiff herein, and set out in the complaint herein in paragraph 3 thereof; that said deed from Stephen A. Osborn to Thomas F. Walsh was recorded in the office of the clerk and recorder of Ouray county, Colorado, in Book 62, at page 326 thereof, on the thirtieth day of November, A. D. 1896.

Fourth. That the defendant is now, and ever since the sixteenth day of June, A. D. 1896, has been in the actual, peaceable, and continuous possession of the premises described in the complaint herein, and is the owner in fee thereof and entitled to the possession of the same.

11 III. For a third defense and answer to said complaint, the defendant alleges that the plaintiff is estopped and ought not to have or maintain his aforesaid action for the reason that the plaintiff on or about the first day of January, 1889 abandoned all the property in controversy herein, with the intent to relinquish all of its title to the same; that subsequently actions were duly brought and judgments were secured by divers parties and duly and regularly rendered against the plaintiff in the county court of Ouray county, Colorado, and the property in controversy herein, abandoned as aforesaid, was duly and regularly levied upon and sold to satisfy said judgments, all of which was done with the knowledge and acquiescence of the plaintiff.

Second. That relying upon said abandonment of the property in

controversy herein, by the plaintiff as aforesaid, and relying upon the legality and regularity of the judgments secured as aforesaid, and upon said levy and sale of said property, with the knowledge, acquiescence and consent of the plaintiff, the defendant did by mesne conveyances, for a valuable consideration, to wit, the sum of ten thousand dollars, become, on the sixteenth day of June, A. D. 1896, the owner and entitled to the possession of the property herein in controversy.

Third. That with the full knowledge, acquiescence, consent, and encouragement of the plaintiff, and in reliance upon the
12 abandonment of the property in controvery herein by the plaintiff as aforesaid, and in reliance upon the regularity of the judgments secured against the plaintiff, and upon the execution, levy, and sale of said property as aforesaid, and in reliance upon the validity of all the steps necessary for the maintenance of the defendant's title to said premises, the defendant, immediately after and continuously since the sixteenth day of June, A. D. 1896, when he became the owner and entered upon the possession of said premises, did begin the working and development of said property, paying the taxes upon the same for the years 1889, 1890, 1891, 1892, 1893, 1894, 1895, 1896, 1897, 1898, 1899, and has expended thereon large sums of money for the purpose of improving said property and rendering it valuable as a mining claim, all of which was done with the knowledge, consent and acquiescence of the plaintiff; that in and about the improvement of said property, and in the development thereof, and for the particular special and permanent benefit of said property, the defendant has, since the sixteenth day of June, A. D. 1896, expended thereon the sum of one hundred twenty-eight thousand, five hundred dollars ($128,500) the same being for the following purposes, to wit:

Underground improvements	$37,000.00
Surface improvements, buildings, mill, tramway, roads, trails, etc	91,500.00
	$128,500.00

13 that said expenditures by the defendant have given to the property in controversy herein all of whatsoever value it may have at the present time, and that without said expenditures, improvements, and developments, made and expended as aforesaid, with the knowledge and acquiescence of the plaintiff, said property would be wholly worthless and of no value whatsoever.

IV. For a fourth defense and answer to said complaint, the defendant alleges:

First. That the plaintiff is estopped and ought not to have or maintain his aforesaid action for the reason that the plaintiff on or about the first day of January, 1889, abandoned all the property in controversy herein, with the intent to relinquish all of its title to the same; that subsequently actions were duly brought and judgments were secured by divers parties and duly and regularly rendered against the plaintiff in the county court of Ouray county,

Colorado, and the property in controversy herein abandoned as aforesaid was duly and regularly levied upon and sold to satisfy said judgments all of which was done with the knowledge and acquiescence of the plaintiff.

Second. That relying upon said abandonment of the property in controversy herein, by the plaintiff as aforesaid, and relying upon the legality and regularity of the judgments secured as
14 aforesaid, and upon said levy and sale of said property, with the knowledge, acquiescence and consent of the plaintiff, the defendant did, by mesne conveyances for a valuable consideration, to wit, the sum of ten thousand dollars, become, on the sixteenth day of June, A. D. 1896, the owner and entitled to the possession of the property herein in controversy.

Third. That being possessed of the property in controversy herein, on the sixteenth day of June, A. D. 1896, as aforesaid, the defendant, with the knowledge and acquiescence of the plaintiff herein, did bring his certain action against The Cosmopolitan Mining Company, the plaintiff herein, on the first day of March, 1897 in the district court of Ouray county, Colorado, to quiet the title to the premises and property in controversy herein, and that in said cause, after said suit was duly and regularly brought, on the eleventh day of May, A. D. 1897, a certain decree in said suit was duly and regularly entered against the plaintiff herein, in and by which said decree it was determined and adjudged that the defendant herein, Thomas F. Walsh, was the owner in fee of the property in controversy herein, and was in and entitled to the quiet and peaceable possession thereof, and that the plaintiff herein, The Cosmopolitan Mining Company, had no right, title, interest, claim, or demand of any kind whatsoever in or to any part of the premises in controversy herein,
15 and that the pretended claim of the Cosmopolitan Mining Company, in and to said premises, was and is wholly without right or justification in law, all of which was done with the knowledge and consent of, and said decree was acquiesced in by The Cosmopolitan Mining Company, the plaintiff herein.

Fourth. That by reason of said above-mentioned action and of the decree and judgment therein, the plaintiff herein, The Cosmopolitan Mining Company, is estopped to claim or set up any right or title whatsoever in and to all or any part of the premises in controversy herein, or to make any claim or demand whatsoever therefor.

Wherefore having fully answered the plaintiff's complaint herein, the defendant prays that he may be hence dismissed, with his costs in this behalf expended.

CHARLES J. HUGHES, Jr.,
Attorney for Defendant.

Jan. 21, 1901.

(Endorsed:) No. 4107.—Div. —. In the U. S. circuit court.—Cosmopolitan Mining Company *vs.* Thomas F. Walsh.—Answer.—Filed Jan. 28, 1901, Robert Bailey, clerk.—Charles J. Hughes, Jr., attorney for defendant.

16 UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the Circuit Court.

COSMOPOLITAN MINING COMPANY, Plaintiff, }
vs. } Replication.
THOMAS F. WALSH, Defendant. }

1. Replying to the second defense of the answer herein, plaintiff admits that during the months of April and May, A. D. 1895, the several parties in said second defense mentioned, attempted to commence in the county court of Ouray county, Colorado, the several actions in said second defense mentioned by filing their respective complaints and having issued their respective summons in said several actions; that certain of said parties, to wit, The A. W. Begole Mercantile Company, John Ashenfelter and P. H. Fennell, attempted to levy attachments upon all of the property in controversy herein by filing in the office of the county clerk and recorder of said Ouray county, copies of writs of attachment issued in said actions respectively, together with a description of the property thus sought to be attached; that pretended judgments were attempted to be rendered against the plaintiff herein in all of the actions in said second defense mentioned; that a pretended writ of special execution issued out of said county court in such action in which the said The A. W.
17 Begole Mercantile Company was plaintiff and the plaintiff herein was defendant; that in the action last mentioned, there was a pretended levy under such writ upon all of the property in controversy herein; that in pursuance of such levy there was a pretended sheriff's sale of all of said property to one J. C. Marsh, trustee; that in pursuance of such sale there was issued to the said Marsh a pretended sheriff's certificate of purchase for said property; that in pursuance of such sale and certificate of purchase, there was made, executed and delivered to one Stephen A. Osborne as assignee of the said Marsh, a pretended sheriff's deed for said property; that a certain instrument, purporting to be a deed from the said Osborne to the defendant herein, appears of record in the office of the county clerk and recorder of said Ouray county, Colorado, in the book and on the page alleged by the defendant and that the defendant is now and ever since the 16th day of June, A. D. 1896, he has been in the actual possession of all of the property in controversy herein.

2. Further replying to said second defense plaintiff denies each and every allegation contained therein which is not in this replication to said second defense specifically admitted.

3. Further replying to said second defense plaintiff alleges, that in no one or more of the several actions therein mentioned was any summons or other process, writ of attachment or other writ of said county court of Ouray county, Colorado, served upon any
18 agent of the plaintiff herein, or served in any other way upon the plaintiff herein; that in no one or more of said actions did the plaintiff ever in any way appear, answer, or submit

or in any other manner become subject to the jurisdiction of said county court, or have any notice or knowledge of the commencement or pendency of any one or more of said actions; that in the action in said second defense alleged to have been commenced by the said W. C. Fulton, no writ of attachment, pretended or otherwise was ever attempted to be levied upon the whole or any part of the property in controversy herein; that notwithstanding such failure to levy or attempt to levy upon the whole or any part of said property, said sheriff of Ouray county pretended to sell the whole of said property to satisfy the judgment alleged to have been rendered in the action last mentioned, and returned the execution of such judgment as satisfied by such sale; that such sale was not preceded by the several advertisements and notices required by the statutes of the State of Colorado in such cases made and provided or preceded by any advertisement or notice whatsoever; that at such sale the property in controversy herein was not sold to the highest bidder for cash; that at such sale said property was sold to the said Marsh as trustee for the several plaintiffs in the several actions in said second defense mentioned; that such sale was made in pursuance of a combination, conspiracy, and agreement upon the part of said several plaintiffs and said Marsh
19 that the amount to be bid at such sale should equal and not exceed the aggregate amount of the several pretended judgments of said plaintiffs and upon the further combination, conspiracy and agreement upon the part of the parties aforesaid that the said Marsh should hold the property as trustee for said plaintiffs, and as their several interests should respectively appear; that by reason of such combination, conspiracy, and agreement upon the part of the parties aforesaid, competition and free bidding at such sale did not and could not take place, and that the plaintiffs in the several actions in said second defense mentioned, the said Marsh, the said Osborne, and the defendant herein and each of them, at all times had full notice and knowledge of all and singular the matters set forth in this replication to said se-ond defense.

I.

Replying to the third defense of the answer herein, plaintiff admits that subsequently to the first day of January, A. D. 1889, divers parties attempted to commence the actions and secure the judgments referred to in the first and second paragraphs of said third defense, by filing their respective complaints and having issued their respective summons in said several actions, and that in all of said actions, except the action attempted to be commenced
20 by a certain W. C. Fulton, attempts were made to levy upon all of the property in controversy herein, by filing in the office of the county clerk and recorder of said Ouray county, copies of writs of attachment issued in said actions respectively, together with descriptions of the property thus sought to be attached and that in all of said actions, attempts were made to sell all of the property in controversy herein for the purpose of satisfying such judgments.

2. Further replying to said third defense, plaintiff denies each and every allegation thereof which is not in this replication to said third defense specifically admitted.

3. Further replying to said third defense plaintiff alleges that in no one or more of the several actions referred to in the first and second paragraphs thereof was any summons or other process, writ of attachment or other writ of said county court of Ouray county, Colorado, served upon any agent of the plaintiff herein or served in any other way upon the plaintiff herein; that in no one or more of said actions did the plaintiff ever in any way appear, answer or submit or in any other way become subject to the jurisdiction of said county court, or have any notice or knowledge of the commencement or pendency of any one or more of said actions; that in one of the actions referred to in said paragraphs of said third defense, viz: the action attempted to be commenced by one W. C. Fulton, no writ of attachment, pretended or otherwise, was ever levied
21 or attempted to be levied upon the whole or any part of the property in controversy herein; that notwithstanding such failure to levy or attempt to levy upon said property, said sheriff of Ouray county pretended to sell the whole of said property to satisfy the judgment alleged to have been rendered in the action last mentioned and returned the execution of such judgment as satisfied by such sale; that such sale was not preceded by the several advertisements and notices required by the statutes of the State of Colorado in such cases made and provided, or preceded by any advertisement or notice whatsoever; that at such sale, the property in controversy herein was not sold to the highest bidder for cash; that at such sale said property was sold to the said Marsh as trustee for the several plaintiffs in the several actions referred to in said paragraphs of said third defense; that such sale was made in pursuance of a combination, conspiracy and agreement upon the part of said several plaintiffs and said Marsh, that the amount to be bid at such sale should equal and not exceed the aggregate amount of the several pretended judgments of said plaintiffs and upon the further combination, conspiracy and agreement upon the part of the parties aforesaid, that the said Marsh should hold the property as trustee for said plaintiffs and as their several interests should respectively appear; that
22 by reason of such combination, conspiracy, and agreement upon the part of the parties aforesaid, competition and free bidding at such sale did not and could not take place, and that the plaintiffs in the several actions referred to in said paragraphs of said third defense, the said Marsh, the said Osborne and the defendant herein, and each of them, at all times had full notice and knowledge of all and singular the matters set forth in this replication to said third defense.

1.

Replying to the fourth defense of the answer herein, plaintiff admits that subsequently to the first day of January, A. D. 1889, divers parties attempted to commence the actions and secure the judgments referred to in the first and second paragraphs of said fourth

defense by filing their respective complaints and having issued their respective summons in said several actions, and that in all of said actions except the action attempted to be commenced by a certain W. C. Fulton, attempts were made to levy upon all of the property in controversy herein by filing in the office of the county clerk and recorder of said Ouray county copies of writs of attachment issued in said actions respectively, together with descriptions of the
23 property thus sought to be attached, and that in all of said actions attempts were made to sell all of the property in controversy herein for the purpose of satisfying such judgments, that on the 16th day of June, A. D. 1896, the defendant herein was in the actual possession of said property and that on the date last mentioned the defendant attempted to commence against the plaintiff the action referred to in the third paragraph of said fourth defense by filing his complaint and issuing his summons therein, and that all of the property in controversy herein, except the Norma lode and the Norma mill site, *were* included in the action last mentioned.

2.

Further replying to said fourth defense, plaintiff denies each and every allegation thereof which is not in this replication to said fourth defense specifically admitted.

3.

Further replying to said fourth defense plaintiff alleges that in no one or more of the several actions referred to in the first and second paragraphs thereof, was any summons or other process or writ of attachment or other writ of said county court of Ouray county, Colorado, served upon any agent of the plaintiff herein, or served in any other way upon the plaintiff herein; that in no one or more of said actions did the plaintiff ever in any way appear, answer
24 or submit or in any other manner become subject to the jurisdiction of said county court, or have any notice or knowledge of the commencement or pendency of any one or more of said actions; that in one of the actions referred to in said paragraphs of said fourth defense, viz: the action attempted to be commenced by one W. C. Fulton, no writ of attachment, pretended or otherwise, was ever levied or attempted to be levied upon the whole or any part of the property in controversy herein; that notwithstanding such failure to levy or attempt to levy upon said property, said sheriff of Ouray county pretended to sell the whole of said property to satisfy the judgment alleged to have been rendered in the action last mentioned and returned the execution of such judgment as satisfied by such sale; that such sale was not preceded by the several advertisements and notice required by the statutes of the State of Colorado in such cases made and provided, or preceded by any advertisement or notice whatsoever; that at such sale the property in controversy herein was not sold to the highest bidder for cash; that at such sale said property was sold to the said Marsh as trustee for the several plaintiffs in the several actions referred to in said paragraphs of said fourth

defense; that such sale was made in pursuance of a combination, conspiracy, and agreement upon the part of said several plaintiffs and said Marsh, that the amount to be bid at such sale should equal and not exceed the aggregate amount of the several pretended judgments of said plaintiffs and upon the further combination, conspiracy and agreement upon the part of the parties aforesaid, that the said Marsh should hold the property as trustee for said plaintiffs and as their several interests should respectively appear; that by reason of such combination, conspiracy and agreement upon the part of the parties aforesaid, competition and free bidding at such sale did not and could not take place, and that the plaintiffs in the several actions referred to in said paragraphs of said fourth defense, the said Marsh, the said Osborne and the defendant herein and each of them at all times, had full notice and knowledge of all and singular the matters set forth in this replication to said fourth defense.

4.

Further replying to said fourth defense plaintiff alleges, that in the action referred to in the third and fourth paragraphs thereof, no summons or other process of the district court within and for Ouray county, Colorado, was ever served upon any agent of the plaintiff herein, or served in any other way upon the plaintiff herein, and that in the action last mentioned, the plaintiff herein never in any way appeared, answered, or submitted, or in any other way became subject to the jurisdiction of said district court and had no notice or knowledge of the commencement or pendency of the same.

Wherefore, plaintiff prays for judgment according to the prayer of its complaint herein.

PERRY & BLISS,
GEORGE C. PRESTON,
Attorneys for Plaintiff.

HURLBURT, JONES AND CABOT, *Of Counsel.*

(Endorsed:) No. 4107.—United States of America, district of Colorado.—Cosmopolitan Mining Company, plaintiff, *vs.* Thomas F. Walsh, defendant.—Replication.—Filed Feb. 28, 1901, Robert Bailey, clerk.

10th day, Monday, May 20th, A. D. 1901.

Present: The Honorable Moses Hallett, district judge, and the Honorable John A. Riner, district judge of the district of Wyoming, assigned to the district of Colorado, and other officers as noted on the seventh instant.

And before the Honorable Moses Hallett, district judge, the following proceedings were had:

COSMOPOLITAN MINING COMPANY vs. THOMAS F. WALSH. } 4107. Action for Possession of Specific Real Property and for Damages.

At this day comes the plaintiff by C. M. Bliss, Esquire, its attorney, and thereupon on its motion,

27 It is ordered by the court that the plaintiff may file herein an amendment to its complaint herein instanter.

UNITED STATES OF AMERICA, *District of Colorado*, } *ss:*

In the Circuit Court of the United States, District of Colorado.

COSMOPOLITAN MINING COMPANY, a Corporation, Plaintiff, vs. THOMAS F. WALSH, Defendant. } Amendment to Complaint.

Now comes the plaintiff and leave of the court being first had and obtained, the complaint is amended by striking from the prayer thereof the words and figures "one hundred thousand dollars ($100,000)" and inserting in lieu thereof the words and figures "one dollar ($1.00)" and also by striking therefrom the words "withholding possession thereto" and inserting the words "for unlawfully ousting the plaintiff therefrom."

JOHN A. PERRY,
GEO. C. PRESTON,
C. M. BLISS,
Attorneys for Plaintiff.

(Endorsed:) No. 4107.—U. S. circuit court, district of Colorado.—Cosmopolitan Mining Company, a corporation, plaintiff, *vs.*

28 Thomas F. Walsh, defendant.—Amendment to complaint.—Filed May 20, 1901, Robert Bailey, clerk.

UNITED STATES OF AMERICA, *District of Colorado*, } *ss:*

In the Circuit Court.

THE COSMOPOLITAN MINING COMPANY, Plaintiff, vs. THOMAS F. WALSH, Defendant. }

Amendments to Replication to Second, Third, and Fourth Defenses.

4.

And further replying to the said second defense of the answer herein this plaintiff avers that at, for many years prior to and ever since the commencing of the several actions in said defense particularly mentioned and described, and the service of the writs of summons in said several actions upon J. M. Jardine, plaintiff's supposed agent,

this plaintiff was not, had not been and has not been doing business of any kind or character in the State of Colorado, and that by reason of the actions of the said county court and the sheriff of Ouray county, Colorado, had and done in and in pursuance of said several actions and by defendant in said defense particularly mentioned and
29 described, the plaintiff has been and is being deprived of its property, viz: the property sought to be recovered in this action, without notice, hearing, opportunity to be heard, or due process of law, and in violation of the 14th amendment to the Constitution of the United States.

And further replying to the third defense of the answer herein this plaintiff avers that at, for many years prior to and ever since the commencing of the several actions in said defense particularly mentioned and described, and the service of the writs of summons in said several actions upon J. M. Jardine, plaintiff's supposed agent, this plaintiff was not, had not been, and has not been doing business of any kind or character in the State of Colorado, and that by reason of the actions of the said county court and the sheriff of Ouray county, Colorado, had and done in and in pursuance of said several actions and by defendant in said defense particularly mentioned and described, the plaintiff has been and is being deprived of its property, viz: the property sought to be recovered in this action, without notice, hearing, opportunity to be heard, or due process of law, and in violation of the 14th amendment to the Constitution of the United States.

5.

And further replying to the fourth defense of the answer herein this plaintiff avers that at, for many years prior to and ever since the commencing of the action in said defense particularly
30 mentioned and described, and the service of the writ of summons in said action upon J. M. Jardine, plaintiff's supposed agent, plaintiff was not, had not been, and has not been doing business of any kind or character in the State of Colorado, and that by reason of the actions of the district court of Ouray county, Colorado had and done in and by the defendant in said defense particularly mentioned and described, the plaintiff has been and is being deprived of its property, viz: the property sought to be recovered in this action without notice, hearing, opportunity to be heard, or due process of law and in violation of the 14th amendment to the Constitution of the United States.

PERRY AND BLISS,
GEO. C. PRESTON,
Attorneys for Plaintiff.

(Endorsed:) 4107.—In U. S. circuit court.—Cosmopolitan Mining Company, plaintiff *vs.* Thomas F. Walsh, defendant.—Amendments to replication.—Filed Nov. 23, 1901, Robert Bailey, clerk.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the Circuit Court.

THE COSMOPOLITAN MINING COMPANY, Plaintiff, *vs.* THOMAS F. WALSH, Defendant. } Demurrer. No. 4107.

31 Comes now the defendant by Charles J. Hughes, Jr. and Thomas, Bryant, and Lee, his attorneys, and demurs to the amendment to the replication heretofore filed to the second defense of the answer herein, and for ground of said demurrer the defendant alleges that the said replication as amended as aforesaid, does not state facts sufficient to constitute a cause of action against this defendant. And the defendant demurs to the amendment to the replication heretofore filed to the third defense of the answer herein, and for ground of said demurrer the defendant alleges that the said replication as amended as aforesaid does not state facts sufficient to constitute a cause of action against this defendant. And the defendant demurs to the amendment to the replication heretofore filed to the fourth defense of the answer herein, and for ground of said demurrer the defendant alleges that the said replication as amended as aforesaid, does not state facts sufficient to constitute a cause of action against this defendant.

CHAS. J. HUGHES, JR.
THOMAS, BRYANT & LEE,
Attorneys for Defendant.

(Endorsed:) No. 4107.—In the U. S. circuit court of district of Colorado.—The Cosmopolitan Mining Company, plaintiff *versus* Thomas F. Walsh, defendant.—Demurrer to amendment to replication.—Filed Dec. 2 1901, Robert Bailey, clerk. C. J. Hughes, Jr. and Thomas, Bryant, & Lee, attorneys for defendant 621–627 Ernest & Cranmer bldg., Denver, Colo.

Forty-third day, November term, Monday, January 6th, A. D. 1902.

Present: The Honorable Moses Hallett, district judge, and other officers as noted on the 5th day of November last past.

32 COSMOPOLITAN MINING COMPANY *vs.* THOMAS F. WALSH. } 4107. Action for Possession of Specific Real Property and for Damages.

At this day comes the plaintiff by John A. Perry, Esquire, its attorney and the defendant by W. H. Bryant, Esquire, his attorney also comes.

And thereupon the defendant by his attorney saith he will and doth hereby withdraw the demurrer to the amended replication heretofore filed by him herein.

TUESDAY, *February 4th, A. D.* 1901.

Present: The Honorable Moses Hallett, district judge, and other officers as noted on the 5th day of November last past.

COSMOPOLITAN MINING COMPANY *vs.* THOMAS F. WALSH. } 4107. Action for Possession of Specific Real Property and for *Damages.*

And this day comes the plaintiff by George C. Preston, Esquire, its attorney, and the defendant by C. S. Thomas, Esquire, his attorney also comes, and the motion to dismiss this cause coming on now to be heard is argued by counsel. And the court having considered the same, and being now fully advised in the premises.

It is ordered by the court for good and sufficient reasons to the court appearing that said motion be and the same is hereby denied.

33 36th day, Thursday, June 19th, A. D. 1902.

Present: The Honorable Moses Hallett, district judge, and the Honorable John A. Marshall, district judge of the district of Utah, assigned to the district of Colorado, and other officers as noted on the sixth day of May last past.

And before the Honorable John A. Marshall, district judge of the district of Utah, assigned to the district of Colorado, the following further proceedings were had:

COSMOPOLITAN MINING COMPANY *vs.* THOMAS F. WALSH. } 4107. Action for Possession of Specific Real Property and for Damages.

At this day comes the plaintiff by George C. Preston, Esquire, John A. Perry, Esquire, and C. M. Bliss, Esquire, its attorneys, and the defendant by C. J. Hughes, Jr. Esquire, and C. S. Thomas Esquire, his attorneys also comes. And thereupon comes a jury, to wit:

Roland G. Parvin, O. F. Baisinger, Fred J. Sterner, Avery R. Thompson, George R. Becker, J. E. Prout, George W. Thompson, L. W. Wells, C. W. White, F. N. Oberling, Fred'k K. Walker and Walter L. Baldridge, twelve good and lawful men and they are each duly selected and tried empanelled and sworn to well and truly try the issues herein joined and a true verdict render according to the evidence.

And thereupon comes the evidence the hearing of which is continued to the hour of adjournment.

34 And the said jurors being now each duly cautioned by the court not to converse among themselves or with others touching this cause or the matters at issue herein or the evidence heard or any part thereof nor to listen to such conversation of others, are permitted to retire to meet the court at its next incoming.

COSMOPOLITAN MINING COMPANY *vs.* THOMAS F. WALSH.	4104. Action for Possession of Specifie Real Property and for Damages.

At this day comes the plaintiff by George C. Preston, Esquire, its attorney and the defendant by C. S. Thomas Esquire, his attorney, also comes.

And thereupon on motion of defendant, it is ordered by the court that he have leave to file herein an amendment to his answer.

37th day, Friday, June 20th, A. D. 1902.

Present: The Honorable Moses Hallett, district judge, and the Honorable John A. Marshall, district judge of the district of Utah, assigned to the district of Colorado, and other officers as noted on the sixth day of May last past. And before the Honorable John A. Marshall, district judge of the district of Utah assigned to the district of Colorado the following proceeding was had:

35	COSMOPOLITAN MINING COMPANY *vs.* THOMAS F. WALSH.	4107. Action for Possession of Specific Real Property and for Damages.

At this day come again the said parties by their attorneys respectively and the said jurors being now all here present and in the jury-box the trial herein is resumed.

And the said jurors having heard the evidence produced herein, and being thereunto duly instructed by the court, upon their oath do say, they find the issues herein joined in favor of the defendant and that he is entitled to the possession of the demanded premises.

39th day, Monday, June 23d, A. D. 1902.

Present: The Honorable Moses Hallett, district judge, and the Honorable John A. Marshall, district judge of the district of Utah, assigned to the district of Colorado, and other officers as noted on the sixth day of May last past.

And before the Honorable John A. Marshall, district judge of the district of Utah assigned to the district of Colorado, the following proceedings were had:

36	COSMOPOLITAN MINING Company *vs.* THOMAS F. WALSH.	4107. Action for Possession of Specific Real Property and for Damages.

At this day comes the plaintiff by G. C. Preston, Esquire, its attorney, and the defendant by C. S. Thomas, Esquire, his attorney, also comes. And the motion of the plaintiff for a new trial of the issues herein joined coming on now to be heard is submitted to the court and the court having considered the same and being now fully advised in the premises.

It is ordered by the court for good and sufficient reasons to the court appearing that said motion be and the same is hereby denied. And bond on writ of error will be in the sum of five hundred dollars ($500).

Wherefore, it is considered by the court upon the verdict of the jury herein, that the defendant go hence hereof without day, and have and recover of and from the plaintiff his costs by him in this behalf laid out and expended, to be taxed, and have execution therefor.

37 FRIDAY, *September 12th, A. D.* 1902.

At chambers before the Honorable John A. Marshall, district judge of the district of Utah, assigned to the district of Colorado the following proceeding was had:

COSMOPOLITAN MINING COMPANY vs. THOMAS F. WALSH. } 407. Action for Possession of Specific Real Property and for Damages.

For good cause shown, it is hereby ordered that the return day of the citation on writ of error to the Supreme Court of the United States in this cause, be and the same is hereby enlarged for thirty (30) days.

In the Circuit Court of the United States for the District of Colorado.

COSMOPOLITAN MINING COMPANY, Plaintiff, Plaintiff in Error,
38 vs.
THOMAS F. WALSH, Defendant, Defendant in Error. } No. 4107.

Petition for Writ of Error to the Supreme Court of the United States.

To the Honorable John A. Marshall, judge of the district court of the United States for the district of Utah, assigned to hold the circuit court of the United States for the district of Colorado:

The petition of The Cosmopolitan Mining Company, plaintiff, and plaintiff in error, shows unto your honor that in the pleadings in this action, as well as in the rulings of your honor in admitting and refusing evidence and in giving and refusing to give the instructions set forth in the assignment of errors hereto annexed, there were involved the application and construction of the Constitution of the United States, viz., of that part of the fourteenth amendment to the same which provides for due process of law, and that your petitioner feels aggrieved by the verdict of the jury and the judgment of this honorable court rendered on the 23rd day of June, A. D. 1902.

Wherefore your petitioner prays that it may be allowed to prosecute a writ of error to the honorable Supreme Court of the United States under and according to the laws of the United States
39 in that behalf made and provided; that the bond submitted herewith be approved, and that upon the allowance of this

petition and the approval of said bond all further proceedings in this action in this court be suspended and stayed until the determination of said writ of error by the said Supreme Court of the United States.

And your petitioner will ever pray.

PERRY AND BLISS AND
GEORGE C. PRESTON,
Attorneys for Plaintiff in Error.

(Endorsed:) No. 4107.—U. S. circuit court, district of Colorado.—Cosmopolitan Mining Company *vs.* Thomas F. Walsh.—Petition for writ of error, U. S. S. C.—Filed Aug. 18, 1902, Robert Bailey, clerk.—Perry and Bliss and George C. Preston, attorneys for plaintiff.

In the Circuit Court of the United States for the District of Colorado.

COSMOPOLITAN MINING COMPANY, Plaintiff, Plaintiff in Error,
vs.
THOMAS F. WALSH, Defendant, Defendant in Error. } No. 4107.

Certificate of Judge.

I, John A. Marshall, United States district judge for the
40 district of Utah, assigned to hold the circuit court of the United States for the district of Colorado, before whom the above-entitled action was tried and judgment rendered on June 23, 1902, do hereby certify that in the pleadings in this action as well as in the rulings of this court in admitting and refusing to admit evidence and in giving and refusing to give instructions to the jury as set forth in the assignment of errors hereto annexed, there were involved the application and construction of the Constitution of the United States, viz: of the part of the fourteenth amendment to the same which provides for due process of law.

Witness my hand and seal at Denver, Colorado, this 15th day of August, 1902.

J. A. MARSHALL,
U. S. Dist. Judge for the District of Utah, Assigned to Hold the Circuit Court of the United States for the District of Colorado.

(Endorsed:) No. 4107.—U. S. circuit court, district of Colorado.—Cosmopolitan Mining Company *vs.* Thomas F. Walsh.—Judge's certificate.—Filed Aug. 18, 1902, Robert Bailey, clerk.—Perry & Bliss, and George C. Preston, attorneys for plaintiff.

41 In the Circuit Court of the United States for the District of Colorado.

COSMOPOLITAN MINING COMPANY, Plaintiff, Plaintiff in Error,
v.
THOMAS F. WALSH, Defendant, Defendant in Error.

No. 4107.
Assignment of Errors.

Now comes the plaintiff in error, by Messrs. Perry and Bliss, and George C. Preston, Esquire, its attorneys, and files the following assignment of the errors upon which it will rely in prosecuting its writ of error from the Supreme Court of the United States reviewing the judgment in the above-entitled cause, viz:

1. The United States circuit court in and for the district of Colorado erred in overruling the objection of the plaintiff in error to the introduction in evidence at the trial of said cause of Defendant's Exhibit No. 5 consisting of a certified copy from the county clerk and recorder of Ouray county, Colorado, of the alleged designation of Ouray, in said county, as the principal place where the business of the plaintiff in error was to be carried on, and of one J. M. Jardine as the authorized agent of the plaintiff in error upon whom process might be served.

2. The United States circuit court in and for the district of Colorado erred in overruling the objection of the plaintiff in error to the introduction in evidence at the trial of said cause of Defendant's Exhibit No. 6 consisting of a certified copy from the secre-
42 tary of state of the State of Colorado of an alleged duplicate of Defendant's Exhibit No. 5.

3. The United States circuit court in and for the district of Colorado erred in overruling the objection of the plaintiff in error to the introduction in evidence at the trial of said cause of the certificate contained in Defendant's Exhibit No. 5 that it did not appear from the records of the office of said county clerk and recorder that the alleged authority contained in Defendant's Exhibit No. 5 had ever been revoked.

4. The United States circuit court in and for the district of Colorado erred in overruling the objection of the plaintiff in error to the introduction in evidence at the trial of said cause of Defendant's Exhibit No. 7, consisting of a certificate from the secretary of state of the State of Colorado that it did not appear from the records of his office that the alleged authority contained in Defendant's Exhibit No. 6 had ever been revoked.

5. The United States circuit court in and for the district of Colorado erred in overruling the objection of the plaintiff in error to the introduction in evidence at the trial of said cause of any part of the record in the case in the district court of Ouray county, Colorado, wherein Thomas F. Walsh was plaintiff and Cosmopolitan Mining Company and J. M. Jardine were defendants, said record being

designated as Defendant's Exhibit 13 and consisting of cer-
43 tified copies of the complaint, the answer of the said J. M. Jardine, the writ of summons and the return indorsed thereon, the præcipe for a default, the order of default, the transcript of the judgment docket and the decree in the action last above mentioned.

6. The United States circuit court in and for the district of Colorado erred in overruling the objection of the plaintiff in error to the introduction in evidence at the trial of said cause of Defendant's Exhibit No. 1, consisting of a certified copy of a sheriff's deed dated May 26, 1896, and purporting to be issued in pursuance of the judgment and proceedings in the case in the county court of Ouray county, Colorado, wherein the A. W. Begole Mercantile Company was plaintiff and Cosmopolitan Mining Company was defendant (Defendant's Exhibits Nos. 9, 10, and 19) to convey to one Stephen A. Osborne the real property in controversy in this cause.

7. The United States circuit court in and for the district of Colorado erred in overruling the objection of the plaintiff in error to the introduction in evidence at the trial of said cause of any part of the record in the case in the county court of Ouray county, Colorado, wherein John Ashenfelter was plaintiff and Cosmopolitan Mining Company was defendant, said record being designated as Defendant's Exhibit 8, consisting of certified copies of the order of default and judgment and of the transcript of the judgment docket, and as Defendant's Exhibit 20, consisting of certified cop-
44 ies of the complaint, affidavit in attachment, undertaking in attachment, the summons and return thereon, the writ of attachment issued to the sheriff of San Miguel county, Colorado, and return thereon, writ of special execution and return thereon, and præcipe for writ of special execution in the case last above mentioned.

8. The United States circuit court in and for the district of Colorado erred in overruling the objection of the plaintiff in error to the introduction in evidence at the trial of said cause of any part of the record offered by the defendant in the case in the county court of Ouray county, Colorado, wherein The A. W. Begole Mercantile Company was plaintiff and Cosmopolitan Mining Company was defendant, said record being designated as Defendant's Exhibit 9 and consisting of certified copies of the order of default and judgment and of the transcript of the judgment docket, as Defendant's Exhibit 10, consisting of præcipe for special execution, writ of attachment issued to the sheriff of Ouray county, Colorado, and return thereon, and as Defendant's Exhibit 19, consisting of certified copies of the complaint undertaking in attachment, affidavit in attachment, summons and return thereon, writ of attachment issued to the sheriff of San Miguel county, Colorado, and return thereon, præcipe for default, writ of special execution and return thereon, and prorating order in the case last above mentioned.

45 9. The United States circuit court in and for the district of Colorado erred in overruling the objection — the plaintiff in error to the introduction in evidence at the trial of said cause of any part of the record in the case of the county court of Ouray county,

Colorado, wherein P. H. Fennel was plaintiff and Cosmopolitan Mining Company was defendant, said record being designated as Defendant's Exhibit 11, consisting of certified copies of the order of default and judgment and of the transcript of the docket judgment and Defendant's Exhibit 21, consisting of certified copies of the complaint, undertaking in attachment, affidavit in attachment, summons and return thereon, writ of attachment issued to the sheriff of San Miguel county, Colorado, and return thereon, writ of attachment issued to the sheriff of Ouray county, Colorado, and return thereon, writ of special execution and return thereon, and præcipe for special execution in the case last above mentioned.

10. The United States circuit court in and for the district of Colorado erred in sustaining the objection of the defendant in error to the introduction in evidence at the trial of said cause of the certified copy of the notice and motion filed by J. M. Jardine in the case in the county court of Ouray county, Colorado, wherein the A. W. Begole Mercantile Company was plaintiff and Cosmopolitan Mining Company was defendant (Defendant's Exhibits Nos. 9, 10, and 19) said notice and motion being designated as Plaintiff's
46 Exhibit R.

11. The United States circuit court in and for the district of Colorado erred in sustaining the objection of the defendant in error to the introduction in evidence of the answer to the question propounded to the witness Story as to whether there were any agents of the Cosmopolitan Mining Company in Ouray county, Colorado, other than J. M. Jardine, the alleged statutory agent of said company, at the time of the institution of the action in the district court of said Ouray county, Colorado, wherein Thomas F. Walsh was plaintiff and Cosmopolitan Mining Company was defendant (Defendant's Exhibit No. 13).

12. The United States circuit court in and for the district of Colorado erred in ruling that it was incompetent for the plaintiff in error to prove at the trial of said cause that the plaintiff in error was not doing business in the State of Colorado, except by having a statutory agent at the time of the institution of the action in the district court of Ouray county, Colorado, wherein Thomas F. Walsh was plaintiff and Cosmopolitan Mining Company was defendant (Defendant's Exhibit No. 13).

13. The United States circuit court in and for the district of Colorado erred in sustaining the objection of the defendant in error to the introduction in evidence at the trial of said cause of the
47 answer to the question propounded to the witness Story as to whether there was any office of the Cosmopolitan Mining Company in Ouray county, Colorado, at the time of the institution of the action in said district court of said Ouray county, wherein Thomas F. Walsh was plaintiff and Cosmopolitan Mining Company was defendant (Defendant's Exhibit No. 13).

14. The United States circuit court in and for the district of Colorado erred in refusing to grant the prayer of the plaintiff directing the jury to return a verdict for the plaintiff.

15. The United States circuit court in and for the district of Colorado erred in giving the following instructions to the jury viz:

The COURT: Gentlemen of the jury, in the view the court takes of this case it becomes a question of law and the court will instruct you to find a verdict in favor of the defendant and that the defendant is entitled to the possession of the demanded premises.

16. The United States circuit court in and for the district of Colorado erred in overruling the motion of the plaintiff for a new trial.

17. The judgment of the United States circuit court in and for the district of Colorado in this cause is contrary to law.

18. The verdict of the jury rendered in this case in the United States circuit court in and for the district of Colorado is contrary to the law and the evidence in the case.

19. The United States circuit court in and for the district
48 of Colorado erred in not rendering judgment for the plaintiff, notwithstanding the verdict of the jury.

To each and all of which rulings of said United States circuit court in and for the district of Colorado the plaintiff by its counsel then and there duly excepted.

Wherefore the plaintiff in error prays that the judgment of said United States circuit court in and for the district of Colorado may be reversed by the Supreme Court of the United States.

PERRY AND BLISS AND
GEORGE C. PRESTON,
Attorneys for Plaintiff in Error.

(Endorsed:) No. 4107.—U. S. circuit court, district of Colorado.—Cosmopolitan Mining Company *vs.* Thomas F. Walsh.—Assignment of errors.—Filed Aug. 18, 1902. Robert Bailey, clerk.—Perry and Bliss and George C. Preston, attorneys for plaintiff.

In the Circuit Court of the United States for the District of Colorado.

UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

COSMOPOLITAN MINING COMPANY, Plaintiff,
v.
THOMAS F. WALSH, Defendant. } No. 4107.

49 Be it remembered, that this cause having on this 19th day of June, 1902, come regularly on for trial before the court and a jury duly empanelled and sworn the plaintiff having appeared by Messrs. Perry and Bliss and George C. Preston, its attorney-, and the defendant having appeared by Messrs. C. J. Hughes, Jr. and C. S. Thomas, his attorneys, and the Honorable John A. Marshall presiding, the plaintiff, to maintain the issues on its part, offered in evidence the following documents viz:—

EXHIBIT A.

Patent of United States of America, dated February 28, 1883, recorded July 23, 1883, in Book 8 page 214 of the records of Ouray county, Colorado, and granting and conveying to the Allied Mines, its successors and assigns, the Emily lode and mill site in Mount Sneffles mining district, county and State aforesaid.

EXHIBIT B.

Patent of the United States of America, dated March 15, 1883, recorded May 18, 1883, in Book 8, page 183, of the records of Ouray county, Colorado, granting and conveying to the Allied Mines, its successors and assigns the Crusader lode, situated in the mining district, county and State aforesaid.

EXHIBIT C.

Patent of the United States of America, dated February 28,
50 1883, recorded July 23, 1883, in Book 8, at page 206, of the records of Ouray county, Colorado, and granting and conveying to the Allied Mines, its successors and assigns, the Hidden Treasure lode and mill site, situate in the mining district, county and State aforesaid.

EXHIBIT D.

Patent of the United States of America, dated February 28, 1883, recorded July 23, 1883, in Book 8, page 202, of the records of Ouray county, Colorado, granting and conveying to the Allied Mines, its successors and assigns, the Talisman lode, situate in the mining district, county and State aforesaid.

EXHIBIT E.

Patent of the United States of America, dated February 28, 1883, recorded July 23, 1883, in Book 8, page 210 of the records of Ouray county, Colorado, and granting and conveying to the Allied Mines, its successors and assigns, the Norma lode and mill site, situate in the mining district, county and State aforesaid.

EXHIBIT F.

Patent of the United States of America, dated April 16, 1883, recorded May 18, 1883, in Book 8 at page 186, of the records of Ouray county, Colorado, and granting and conveying to the Allied Mines, its successors and assigns, the Yellow Rose lode and mill site, situate in the mining district, county and State aforesaid.

EXHIBIT G.

51 Patent of the United States of America, dated October 15, 1884 recorded January 8, 1885, in Book 32, at pages 37 to 40, inclusive, of the records of Ouray county, Colorado, and granting and conveying to Thomas Sanders, his heirs and assigns, the Gertrude lode and mill site, situate in the mining district, county and State aforesaid.

EXHIBIT H.

Certified copy of articles of incorporation of the Allied Mines signed by the secretary of state and under the great seal of the State of New York, said articles being dated January 10, 1880, and the certificate of said secretary of state being dated May 22, 1901.

EXHIBIT I.

Certified copy of mortgage of the Allied Mines to the Farmers' Loan and Trust Company, certificate signed by the county clerk and recorder and under the seal of the county of Ouray, in the State of Colorado; mortgage dated October 1, 1881, recorded October 19, 1881, in Book 13, at page 347, of the records of Ouray county, Colorado, conveying to the mortgagee the several lodes and mill sites respectively described in Exhibits A to G both inclusive, to secure the payment of an issue of bonds aggregating $300,000 certificate of the county clerk and recorder dated May 18, 1901.

EXHIBIT J.

Certified copy of the special acts incorporating and of all acts relating to the Farmers' Loan and Trust Company; certificate
52 signed by the secretary of state, and under the great seal of the State of New York, original incorporating act bearing date February 28, 1822, and the other acts relating to said corporation bearing date April 17, 1822, April 30, 1836, March 30, 1852, April 10, 1860, April 27, 1868, April 30, 1870, May 13, 1880, May 4, 1890, and April 24, 1901, respectively; certificate of said secretary of state bearing date June 14, 1901.

EXHIBIT K.

Transcript of proceedings in the case of The Farmers' Loan and Trust Company *vs.* Allied Mines; transcript signed by the clerk and under the seal of the district court of Arapahoe county, Colorado, consisting of (1) complaint filed October 5, 1882, setting out *in hæc verba* and praying for the foreclosure of Exhibit I; (2) general appearance of the Allied Mines by Henry T. Rogers, Esquire, its attorney, filed October 10, 1882; (3) interlocutory decree ordering the foreclosure of Exhibit I and appointing and directing special com-

missioner to make sale of all of the lodes and mill sites described therein, prayed for by the plaintiff, expressly consented to by the defendant and dated March 28, 1882; (4) report of the special commissioner dated December 22, 1882, showing the foreclosure of Exhibit I and sale of all lodes and mill sites therein mentioned to Thomas Sanders of Haverhill, Massachusetts, for the sum of
$214,666.66 in pursuance of interlocutory decree of court, and
53 (5) final decree dated December 22, 1882, confirming said
sale to said Sanders and reciting Exhibit L (hereinafter particularly described) has been presented for the court's inspection and ordering the execution and delivery of said Exhibit L to the said Sanders; certificate of said clerk of the district court dated June 12, 1901.

EXHIBIT L.

Certified copy of the deed of Amos Steck, special commissioner, in the case of The Farmers' Loan and Trust Company *vs.* Allied Mines; deed dated December 21, 1882, recorded May 5, 1883, in Book 21, page 268, of the records of Ouray county, Colorado, consideration $214,666.66 and granting and conveying to Thomas Sanders, his heirs and assigns, all of the right, title, and interest benefit and equity of redemption of the Allied Mines in the several lodes and mill sites respectively described in Exhibits A to G, both inclusive, certificate dated May 18, 1901, and signed by the clerk and recorder and under the seal of the county of Ouray in the State of Colorado.

EXHIBIT M.

Certified copy of mining deed of Thomas Sanders of Haverhill, Massachusetts; deed dated June 24, 1884, recorded July 17, 1884, in Book 31, page 64, of the records of Ouray county, Colorado; consideration five dollars and granting and conveying to
54 Hiram Knowlton of Portland, Maine, and to his heirs and
assigns, the several lodes and mill sites respectively described in Exhibits A to G both inclusive certificate dated May 18, 1901 and signed by the clerk and recorder and under the seal of the county of Ouray in the State of Colorado.

EXHIBIT N.

Certified copy of mining deed of Hiram Knowlton; deed dated July 3, 1884, recorded July 25, 1884, in Book 31, page 70, of the records of Ouray county, Colorado, consideration good and valuable and granting and conveying to the Cosmopolitan Mining Company and to its assigns the several lodes and mill sites respectively described in Exhibits A to G both inclusive; certificate dated May 18, 1901, and signed by the county clerk and recorder and under the seal of the county of Ouray, in the State of Colorado.

EXHIBIT O.

STATE OF MAINE:

Certificate of Organization of a Corporation under the General Law.

The undersigned, officers of a corporation organized at Portland at a meeting of the signers of the articles of agreement therefor, duly called and held *and* 31½ Exchange street at the office of H. and W. J. Knowlton in the city of Portland on Thursday the twenty-sixth day of June A. D. 1884, hereby certify as follows: The name of said corporation is the Cosmopolitan Mining Company.

The purposes of said corporation are buying, owning, selling, leasing, working, developing and improving, gold, silver, copper or other mines and purchasing and holding such other property as may be necessary or convenient.

55 The amount of capital stock is one million dollars.

The amount of capital stock already paid in is sixty-six (66) —.

The par value of the shares is one dollar each.

The names and residences of the owners of said shares are as follows:

Names.	Residence.	No. of shares.
Thomas Sanders.....	Haverhill, Mass.....	50 shares.
George V. Ladd.....	" "	15 "
William J. Knowlton.....	Portland, Me.....	1 "

Said corporation is located at Portland in the county of Cumberland. The number of directors is three, and their names are Thomas Sanders, George V. Ladd and William J. Knowlton. The name of the clerk is —— —— and his residence is ——. The undersigned, Thomas Sanders, is president; the undersigned, George V. Ladd is treasurer; and the undersigned, Thomas Sanders and George V. Ladd are a majority of the directors of said corporation.

Witness our hands this twenty-sixth day of June, A. D. 1884.

THOMAS SANDERS, *President.*
GEORGE V. LADD, *Treasurer.*
THOMAS SANDERS,
GEORGE V. LADD, *Directors.*

CUMBERLAND, *ss:*

JUNE 26TH, A. D. 1884.

Then personally appeared Thomas Sanders and George V. Ladd, and severally made oath to the foregoing certificate, that the same is true.

Before me,

WILLIAM J. KNOWLTON,
Justice of the Peace.

56 STATE OF MAINE,
ATTORNEY GENERAL'S OFFICE, *June* 30, *A. D.* 1884.

I hereby certify that I have examined the foregoing certificate and the same is properly drawn and signed, and is conformable to the constitution and laws of the State.

HENRY B. CLEAVES,
Attorney General.

(All of which was duly certified by the secretary of state of the State of Maine, and was duly endorsed upon the back thereof.)

EXHIBIT P.

Certified copy of certified copy of articles of incorporation of the Allied Mines and of all the general acts of the State of New York in relation to corporations, viz. acts passed February 17, 1848, February 7, 1851, June 7, 1853, April 13, 1854, April 12, 1855, February 16, and April 6, 1857, April 11, 1860, and April 12, 1861.

Certified copy of certified copy dated June 18, 1901, and signed by the secretary of state and under the great seal of the State of Colorado. Certified copy thus certified purports to be dated January 21, 1880, to be signed by the secretary of state and to be under the great seal of the State of New York, and to have been filed in the office of the secretary of State of the state of Colorado on the 29th day of March, 1880.

EXHIBIT Q.

57 Certified copy of certified copy of articles of incorporation of the Cosmopolitan Mining Company and of the general acts of the State of Maine in relation to corporations, viz: Revised Statutes, chapter 46, sections 1 to 57, both inclusive; chapter 361, Laws of 1885, Revised Statutes, chapter 48, sections 1 to 20, both inclusive. Certified copy of certified copy dated June 17, 1901, and signed by the secretary of state and under the great seal of the State of Colorado. Certified copy thus certified purports to be dated November 25, 1885, and to be signed by the secretary of state and to be under the great seal of the State of Maine and to have been filed in the office of the secretary of State of the state of Colorado on February 10, 1886.

Thereupon the defendant by his counsel made the following objection, viz:

Mr. THOMAS: We object to this testimony, if your honor please, for the reason that no proof is offered in connection with this, showing a compliance by the plaintiff corporation with the requirements of the law of the State which would permit it to do business here. Under both the constitution and statutes, before any foreign corporation is permitted to do business in this State, it must appoint its agent, designate its place of business, and nothing of that
58 kind has been shown and therefore we object to the reception of this testimony as standing of itself and proving nothing and not entitling the plaintiff to be heard in this action.

Which objection the court overruled and to which ruling the defendant by his counsel then and there duly excepted.

There being no further objection to said documents they were received and read in evidence.

Thereupon counsel for the plaintiff and defendant respectively made the following statements and admissions in open court in relation to the citizenship of the defendant, viz:

Mr. PERRY: If your honor please, we would like to have it appear in the record that it is admitted that Mr. Walsh is a citizen and resident of this State and was a citizen and resident of this State at the time of the bringing of this suit and prior thereto.

Mr. THOMAS: Yes, there is no doubt about that.

Thereupon plaintiff rested.

Thereupon the defendant by his counsel made the following motion:

Mr. TMOMAS: If the court please, in order to protect our rights in the matter, we move to take the case from the jury and nonsuit the defendant because it has failed to make full compliance with
59 the statutes in the matters we have just suggested in our objection—that is to say, they have failed to show the appointment made and the filing of the certificate.

Which motion the court denied.

To which ruling of the court counsel for defendant then and there duly excepted.

Thereupon the defendant, to maintain the issues on his part, offered in evidence certified copy of a sheriff's deed in words and figures following, viz:

EXHIBIT 1.

Sheriff's Deed on Execution, Colorado.

Whereas, The A. W. Begole Mercantile Company did, at the May term, A. D. eighteen hundred and ninety-five of the county court for the county of Ouray and State of Colorado, recover a judgment against The Cosmopolitan Mining Company, a corporation for the sum of two hundred twenty-six and 09/100 dollars, and the costs of suit, upon which judgment an execution was issued, dated on the 23rd day of July, A. D. eighteen hundred and ninety-five directed to the then sheriff of Ouray county to execute, and by virtue of such

execution, Maurice Corbett then sheriff of said county, levied upon the lands hereinafter described, and the same were struck off and sold to John C. Marsh, trustee, he being the highest and best bidder therefor, and the time and place of the sale thereof having been duly advertised according to law.

And the said John C. Marsh having duly assigned his certificate of purchase to Stephen A. Osborne on Jan'y 4th, 1896, as appears from the record of said certificate of sale and the assignment thereof to be found in Book 25, at page 358, of the records of Ouray county.

60 Now, therefore, know all by this deed, that I, William J. Benton the present sheriff of said county of Ouray in the State of Colorado in consideration of the premises, have granted, bargained and sold, and do hereby convey to the said Stephen A. Osborne of the city of Denver and State of Colorado his heirs and assigns, the following-described tract or tracts of land, to wit: The Yellow Rose Lode mining claim, the Crusader Lode mining claim, the Norma Lode mining claim, the Talisman Lode mining claim, the Hidden Treasure Lode mining claim, the Gertrude Lode mining claim, and the Emily lode mining claim, together with the several mill sites, patented in connection with said lode mining claims and each of them. All situated in Imogene basin in Mt. Sneffles mining district, in the county of Ouray and State of Colorado, being the premises particularly described in that certain deed of conveyance executed by one Thos. F. Wentworth to the Cosmopolitan Mining Company on July 8th, 1890, which deed is of record in the office of the clerk and recorder of Ouray county aforesaid in Book 57 at page 240.

To have and to hold the said described premises, with all the appurtenances thereunto belonging, to the said Stephen A. Osborne, his heirs and assigns, forever.

Witness my hand and seal this 26th day of May in the year of our Lord one thousand eight hundred and ninety-six.

(Signed) WILLIAM J. BENTON, [SEAL.]
Sheriff of Ouray County.

(The foregoing document was endorsed as follows:)

No. 41049.

Sheriff's Deed.

—— ——, sheriff of —— county,
to
—— ——.

STATE OF COLORADO, }
Ouray County, } *ss:*

61 I hereby certify that this deed was filed for record on the 29 day of May, 1896, at 11.10 o'clock a. m. and duly recorded in Book 68, page 284.

RALPH WILLIAMS, *Recorder.*

Fees, $——.

(In red ink were the words "Certified copy.")

Said deed was duly acknowledged and certified.

Thereupon plaintiff by its counsel made the following objection: Plaintiff objects to Defendant's Exhibit 1, viz: the sheriff's deed to Stephen A. Osborn, on the grounds following:

1. That such deed is incompetent, irrelevant, and immaterial.

2. That such deed has been issued in pursuance of alleged judgments of the county court of Ouray county, Colorado; that such alleged judgments are to be considered as foreign judgments in this court; that the provisions of the statutes of Colorado that sheriff's deeds shall be evidence that the provisions of the law in relation to sales of land upon execution are complied with (M. A. S. sec. 2555) are not applicable to this court and that such statutes do not provide that such shall be evidence that the court which rendered the judgments in pursuance of which it was issued had jurisdiction of
the person or the subject-matter of the action or evidence of
62 any matter except the regularity of the proceedings of the
sheriff subsequent to the rendition of the judgment.

3. That it appears from the uncontested evidence in the case at bar that the plaintiff is a foreign corporation, that it nowhere appears in said sheriff's deed or in the recital of the judgment referred to therein that the plaintiff appeared or otherwise submitted to the jurisdiction of the court which rendered the judgments upon which such deed is based or that it was doing business in the State of Colorado when any supposed agent was served with process or that the court acquired jurisdiction of the defendant by personal or other service of process.

Which objection was sustained by the court.

To which ruling of the court in sustaining said objection the defendant by his counsel then and there duly excepted.

The defendant thereupon further to maintain the issues on his part offered in evidence the following documents, viz:—

EXHIBIT 2.

Mining deed of Stephen A. Osborne of Arapahoe county, Colorado, dated June 16, 1896, recorded November 30, 1896, in Book 62, at page 326, of the records of Ouray county, Colorado; consideration $10,000 and granting and conveying unto Thomas F. Walsh of the
county of Arapahoe and State of Colorado the several lodes
63 and mill sites respectively described in Exhibits A to G, both
inclusive.

EXHIBIT 3.

Tax deed from the treasurer of Ouray county, Colorado, dated August 31, 1900, recorded September 5, 1900, in Book 74, page 321, of the records of Ouray county, Colorado, conveying to Thomas F. Walsh the Norma mill site, survey number 547–B.

EXHIBIT 4.

Tax deed from the treasurer of Ouray county, Colorado, dated August 31, 1900, recorded September 5, 1900, in Book 74, page 322, of the records of Ouray county, Colorado, conveying to Thomas F. Walsh the Yellow Rose mill site, survey number 576-B.

Thereupon the plaintiff by its counsel objected to Exhibits 3 and 4 on the ground that they were not pleaded and that the evidence thus offered was at variance with defendant's pleadings and therefore inadmissible.

Which objection was overruled by the court; to which action of the court in overruling said objection the plaintiff by its counsel then and there duly excepted.

Thereupon the defendant further to maintain the issues upon his part offered in evidence the following documents, viz:—

EXHIBIT 5.

Duplicate.

Office of the Cosmopolitan Mining Company.

PORTLAND, ME., *Dec. 16th*, 1885.

64 In compliance with the requirements of the laws of the State of Colorado, the president and secretary of the Cosmopolitan Mining Company of Portland, Maine, hereby certify that said company has designated Ouray in the county of Ouray in said State of Colorado as the principal place where the business of said corporation is to be carried on in said State of Colorado and J. M. Jardine, Esquire, was designated as the authorized agent of said company upon whom process may be served.

In witness whereof the president and secretary have hereunto set our hands the day and year above written.

[Seal Cosmopolitan Mining Company, Organized A. D. 1884.]

AARON H. CRAGIN, *President.*
WILLIAM J. KNOWLTON, *Secretary.*

(All of which was duly acknowledged, and certified by the clerk and recorder of Ouray county, Colorado, who also certified that the same had been duly filed in his office and had never been revoked.)

EXHIBIT 6.

Office of the Cosmopolitan Mining Company,

PORTLAND, ME., *Dec. 16th*, 1885.

In compliance with the requirements of the laws of the State of Colorado the president and secretary of the Cosmopolitan Mining Company of Portland Maine hereby certify that said company has designated Ouray in the county of Ouray in said State of Colorado as the principal place where the business of said corporation is to be

carried on in said State of Colorado and J. M. Jardine, Esquire was designated as the authorized agent of said corporation upon whom process may be served.

In witness whereof the president and secretary have hereunto set our hands the day and year above written.

[Seal Cosmopolitan Mining Company, Organized A. D. 1884.]

AARON H. CRAGIN, *President.*
WILLIAM J. KNOWLTON, *Secretary.*

65 (All of which was duly acknowledged, and certified by the clerk of Cumberland county.)

EXHIBIT 7.

UNITED STATES OF AMERICA, }
State of Colorado, } *ss:*

STATE OF COLORADO,
OFFICE OF THE SECRETARY OF STATE.

I, David A. Mills, secretary of state of the State of Colorado, do hereby certify that I have caused the indices of this office to be carefully examined, and find that a certificate was filed in this office February 10th, 1886, by "Cosmopolitan Mining Company" of Portland, Maine, designating J. M. Jardine as agent for the said company for the State of Colorado, upon whom process might be served, and that this is the last designation of any agent of said company filed as the same appears from the indices of this office.

In testimony whereof, I have hereunto set my hand and affixed the great seal of the State of Colorado, at the city of Denver this seventeenth day of June, A. D. 1902.

(Signed) DAVID A. MILLS,
Secretary of State,
By —— ——, *Deputy.*

[Seal State of Colorado, 1876.]

Thereupon, plaintiff by his counsel objected to exhibits numbered 5, 6, and 7, on the grounds.

1. That the only purpose for which such evidence was offered was to show the appointment of a supposed agent of the plaintiff in the case at bar authorized to receive personal service of summons,
66 and thus warrant the State court in rendering a judgment *in personam* against said plaintiff.

2. That such a judgment could not be so rendered against such plaintiff unless there appeared in the record of the judgment the averment that such plaintiff was doing business in the State of Colorado when its supposed agent was thus served, and the further averment that the supposed agent thus served had authority to bind such plaintiff by the receipt of such service, and that both of these averments are essential jurisdictional requirements which cannot be proved by extrinsic evidence.

To the statements in the certificates that the authority of J. M. Jardine did not appear to have been revoked plaintiff by his coun-

sel further objected that said statements are wholly incompetent' irrelevant and immaterial.

Which objections were overruled by the court provisionally, and with leave to the plaintiff to renew the same after the defendant had introduced all of his evidence.

To which action of the court in overruling said objections provisionally plaintiff by his counsel then and there duly excepted.

Thereupon the defendant further to maintain the issues upon his part offered the following documents in evidence, viz:

67 EXHIBIT 8.

JOHN ASHENFELTER, Plaintiff,
vs.
THE COSMOPOLITAN MINING CO., a Corporation, Defendant. } 1439. Default.

Now, on this day, being the 27" day of June, 1895, plaintiff, by his counsel, Emerson and Bradshaw, appeared and filed his application for default herein against the above-named defendant; and it appearing to the court that summons has been served upon one J. M. Jardine, the heretofore duly authorized and acting agent for said company; and that the said defendant has made no appearance herein; and it further appearing that the complaint of plaintiff is duly verified, and that the time for the appearance of said defendant has expired; it is therefore ordered that default do and the same hereby does enter against said defendant.

JOHN ASHENFELTER, Plaintiff,
vs.
THE COSMOPOLITAN MINING CO., a Corporation, Defendant. } 1439. Judgment.

Now on this day appeared Emerson and Bradshaw, attorneys for plaintiff; the said defendant appearing not, and moved the court that the said cause come on for hearing upon its merits; whereupon the evidence on behalf of plaintiff was introduced before the court without the intervention of a jury. And it appearing to the court that the said defendant is justly indebted to the said plaintiff in the sum of 49 and 82/100 dollars, including interest to date. And it further appearing that default has been duly entered herein in favor of the plaintiff and against the said defendant; it is therefore ordered by the court after being fully advised in the premises and after having heard the testimony of the said plaintiff introduced herein in open court, that the said plaintiff, John Ashenfelter, do
68 have and recover of and from the said defendant The Cosmopolitan Mining Company, the just and full sum of forty-nine and 82/100 dollars, together with his costs herein expended taxed at 22 70/100 dollars. And it is further ordered that the attachment herein be sustained. For which judgment let special execution issue.

ROBT H. WILSON, *Judge.*

No.	Judgment debtors.	Judgment creditors.	Judgment.	Time of entry.	Where entered in judgment book.		Fee book.	Page.	Execution docket.	Satisfaction of judgment when entered.	Nature of relief granted.
					No.	Page.					
1439	The Cosmopolitan Mining Company.	John Ashenfelter.	49.82 (Costs) 22.70	June 27, 1895.	D	171	C	294	1-70	.....	Money judgment.

John Ashenfelter, plaintiff, *vs.* The Cosmopolitan Mining Company, defendant. State of Colorado, county of Ouray, *ss:* In the county court within and for the county of Ouray aforesaid, the —— term, A. D. 18—.

70 (All of which was duly certified by the clerk of Ouray county.)|

EXHIBIT 9.

THE A. W. BEGOLE MERCANTILE CO., a Corporation, Plaintiff,
vs.
THE COSMOPOLITAN MINING CO., a Corporation, Defendant. } Default.

On this 27th day of June, 1895, plaintiff by its counsel, Emerson and Bradshaw, appeared and filed their application for default herein against the above-named defendants and it appearing to the court that summons has been served upon one J. M. Jardine, the heretofore duly authorized and acting agent for said company, and that the said defendant has made no appearance herein; and it further appearing that the complaint of plaintiff is duly verified, and that the time for the appearance of said defendant has expired. It is therefore ordered that default do and the same hereby does enter against said defendant.

THE A. W. BEGOLE MERCANTILE CO., a Corporation, Plaintiff,
vs.
THE COSMOPOLITAN MINING CO., a Corporation, Defendant. } 1437. Judgment.

Now on this day appeared Emerson and Bradshaw, attorneys for plaintiff; the said defendant appearing not, and moved the court that the said cause come on for hearing upon its merits, whereupon the evidence on behalf of plaintiff was introduced before the court without the intervention of a jury. And it appearing to the court that the said defendant is justly indebted to the said plaintiff in the sum of 226 9/100 dollars, including interest to date. And it further appearing that default has been duly entered herein in favor
71 of the plaintiff and against the said defendant,

It is therefore ordered by the court after being fully advised in the premises and after having heard the testimony of the said plaintiff introduced herein in open court, that the said plaintiff The A. W. Begole Mercantile Company do have and recover of and from the said defendant The Cosmopolitan Mining Company the just and full sum of two hundred and twenty-six and 9/100 dollars together with its costs herein expended taxed at 24 58/100 dollars.

And it is further ordered that the attachment herein be sustained. For which judgment let special execution issue.

(Signed) ROB'T H. WILSON, *Judge.*

No.	Judgment debtors.	Judgment creditors.	Judgment.	Time of entry.	Where entered in judgment book.		Fee book.	Page.	Execution docket.	Satisfaction of judgment when entered.	Nature of relief granted.
					No.	Page.					
1437	The Cosmopolitan Mining Company, a corporation.	The A. W. Begole Mercantile Company, a corporation.	226.09 (Costs) 24.58	June 27, 1895.	D	170	C	292	1-70	.....	Money judgment.

The A. W. Begole Mercantile Company, a corporation, plaintiff, *vs.* The Cosmopolitan Mining Company, a corporation, defendant. State of Colorado, county of Ouray, *ss:* In the county court within and for the county of Ouray aforesaid, the —— term, A. D. 18—.

73 (All of which was duly certified by the clerk of the county court of Ouray county.)

EXHIBIT 10.

STATE OF COLORADO, } ss:
County of Ouray, }

In the County Court within and for said County and State.

THE A. W. BEGOLE MERCANTILE COMPANY, a Corporation, Plaintiff,
vs.
COSMOPOLITAN M'N'G CO., Defendant.

To Rob't H. Wilson, judge and clerk of said court:

You will please issue special execution in the above-entitled cause, and this shall be your warrant therefor.

(Signed) EMERSON & BRADSHAW,
Att'ys for Pl'ff.

STATE OF COLORADO, } ss:
County of Ouray, }

In the County Court within and for the County of Ouray, State of Colorado.

THE A. W. BEGOLE COMPANY, a Corporation, Plaintiff,
vs.
THE COSMOPOLITAN MINING COMPANY, a Corporation, Defendant.
} Writ of Attachment.

74 The People of the State of Colorado to the sheriff of the said county of Ouray, Greeting:

Whereas, the above-entitled action was commenced in the county court in and for the said county of Ouray in the State of Colorado, by the plaintiff in the said action to recover from the defendant The Cosmopolitan Mining Company in the said action the sum of two hundred and thirteen and 02/100 dollars, lawful money of the United States, besides interest at the rate of 8 per cent. per annum from the — day of —— A. D. 189–, and costs of suit; and the necessary affidavit and undertaking herein having been filed as required by law.

Now, we do therefore command you, the said sheriff, that you serve a copy hereof on the above defendant, if he be found in your county, and also attach and safely keep all the property of said defendant The Cosmopolitan Mining Company within your said county, not exempt from execution, or so much thereof as may be sufficient to satisfy the said plaintiff's demand as above mentioned, unless the said defendant deposit with you an amount, or give you security, by an undertaking of at least two sufficient sureties, in an amount

sufficient to satisfy such demand, besides costs, or in an amount equal to the value of the property which has been or is about to be attached; in which case you will take such undertaking, and hereof make due and legal service and return.

Witness Rob't H. Wilson, judge and clerk of said court, and the seal thereof at Ouray, this 26th day of April, A. D. 1895.

[SEAL.]

ROB'T H. WILSON,
Judge and Clerk,
By MARY F. WILSON,
Deputy Clerk.

STATE OF COLORADO, } ss:
Ouray County, }

I do certify that I have duly executed the within writ on
75 this 26th day of April, A. D., 1895, by levying upon and attaching all the right, title, interest, claim, and demand and equity of redemption of the Cosmopolitan Mining Company in and to the following real property, to wit: The Yellow Rose lode; the Crusader lode; the Norma lode; the Talisman lode; the Hidden Treasure lode; the Gertrude lode; and the Emily Lode mining claim, situate in Imogene basin, Mt. Sneffles mining district, county of Ouray and State of Colorado, and also the mill sites and each and every of them in said basin, district, county, and State, to said lodes and each and every of them belonging, which said lodes and mill sites are more accurately described in detail and identified by metes and bounds in the books of record in and for the recorder's office of the said county of Ouray and State of Colorado, and to which reference is hereby made. And I hereby certify that I have further executed the within writ by filing a true copy of this levy in the office of the county clerk and recorder of Ouray county said State, this the 26th day of April, 1895. Further, that I have been unable to make service of the within writ on the within-named defendant, there being no person within my said county upon whom process might be served.

MAURICE CORBETT, *Sheriff.*

(The foregoing document was duly endorsed.)

EXHIBIT 11.

P. H. FENNEL, Plaintiff,
vs.
THE COSMOPOLITAN MINING CO., a Corporation, Defendant. } 1440. Default.

Now on this 10th day of July, 1895, plaintiff, by his counsel, Emerson and Bradshaw, appeared and filed his application for default herein against the above-named defendant, and it appearing to the court that summons has been served upon one J. M. Jardine, the heretofore duly authorized and acting agent for said com-
76 pany, and that the said defendant has made no appearance herein; and it further appearing that the complaint of plain-

tiff is duly verified and that the time for the appearance of said defendant has expired; it is therefore ordered that default do and the same hereby does enter against said defendant.

P. H. FENNELL, Plaintiff,
vs.
THE COSMOPOLITAN MINING CO., a Corporation, Defendant. } 1440. Judgment.

Now on this day appeared Emerson and Bradshaw, attorneys for plaintiff, the said defendant appearing not, and moved the court that the said cause come on for hearing upon its merits; whereupon the evidence on behalf of plaintiff was introduced before the court without the intervention of a jury. And it appearing to the court that the said defendant is justly indebted to the said plaintiff in the sum of 126 and 12/100 dollars including interest to date. And it further appearing that default has been duly entered herein in favor or the plaintiff and against the said defendant.

It is therefore ordered by the court after being fully advised in the premises and after having heard the testimony of the said plaintiff introduced herein in open court that the said plaintiff, P. H. Fennel, do have and recover of and from the said defendant The Cosmopolitan Mining Company the just and full sum of one hundred twenty-six and 12/100 dollars, together with his costs therein expended, taxed at 22 82/100 dollars. And it is further ordered that the attachment herein be sustained. For which let special execution issue.

ROB'T H. WILSON, *Judge.*

	Judgment debtors.	Judgment creditors.	Judgment.	Time of entry.	Where entered in judgment book.		Fee book.	Page.	Execution docket.	Satisfaction of judgment when entered.	Nature of relief granted.
					No	Page.					
1440	The Cosmopolitan Mining Company	P. H. Fennell	126.12 (Costs) 22.82	July 10, 1895	D	172	C	295	1-71	.....	Money judgment.

P. H. Fennell, plaintiff, *vs.* The Cosmopolitan Mining Company, defendant. State of Colorado, county of Ouray, *ss:* In the county court within and for the county of Ouray aforesaid, the —— term, A. D. 18—.

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6—447

78 (All of which was duly certified by the clerk of the county court of Ouray county.)

EXHIBIT 12.

W. C. FULTON
vs.
THE COSMOPOLITAN MINING CO. } 1443. Default.

Now on this 26th day of July, 1895, plaintiff by his counsel, Story and Stevens, appeared and filed his application for default herein against the above-named defendant; and it appearing to the court that summons has been served upon one J. M. Jardine, the heretofore authorized and acting agent for said company; and that the said defendant has made no appearance herein; and it further appearing that the complaint of plaintiff herein is duly verified, and that the time for appearance of said defendant has expired; it is therefore ordered that default do and the same does hereby enter against said defendant.

W. C. FULTON
vs.
THE COSMOPOLITAN MINING CO. } 1443. Judgment.

Now on this day appeared Story and Stevens, attorneys for plaintiff; the said defendant appearing not, and moved the court that the said cause come on for hearing upon its merits; whereupon the evidence on behalf of plaintiff was introduced before the court without the intervention of a jury; and it appearing to the court that the said defendant is justly indebted to the said plaintiff in the sum of 1049 and 90/100 dollars including interest to date. And it further appearing that default has been duly entered herein in favor of plaintiff and against said defendant.

79 It is therefore ordered by the court, after being fully advised in the premises, and after having heard the testimony of the said plaintiff introduced herein in open court that the said plaintiff W. C. Fulton, do have and recover of and from the said defendant, The Cosmopolitan Mining Company, the just and full sum of ten hundred forty-nine and 90/100 dollars, together with his costs herein taxed at — dollars. And it is further ordered that the attachment herein be sustained. For which let special execution issue.

No.	Judgment debtors.	Judgment creditors.	Judgment.	Time of entry.	Where entered in judgment book.		Fee book.	Page.	Execution docket.	Satisfaction of judgment when entered.	Nature of relief granted.
					No.	Page.					
1443	The Cosmopolitan Mining Co.....	Wm. C. Fulton...	1049.90 (Costs) 18.60	July 23, 1895.	D	173	C	298	1-71	.....	Money judgment.

William C. Fulton, plaintiff, *vs.* Cosmopolitan Mining Company, defendant. State of Colorado, county of Ouray, *ss:* In the county court within and for the county of Ouray aforesaid, the —— term, A. D. 18—.

81 (All of which was duly certified by the clerk of the county court of Ouray county.)

EXHIBIT 13.

STATE OF COLORADO, } ss:
County of Ouray, }

In the District Court of the Seventh Judicial District of the State of Colorado, Sitting within and for the County of Ouray Aforesaid.

THOMAS F. WALSH, Plaintiff,
vs.
THE COSMOPOLITAN MINING COMPANY and J. M. JARDINE, Defendants.

Be it remembered, that on the first day of March, A. D. 1897, there was filed in the office of the clerk of said district court in said cause a certain complaint in words and figures following, to wit:

STATE OF COLORADO, } ss:
County of Ouray, }

In the District Court Thereof.

THOMAS F. WALSH, Plaintiff,
vs.
THE COSMOPOLITAN MINING COMPANY and J. M. JARDINE, Defendants.

Plaintiff complains and alleges:

First. That the defendant is a corporation organized under the laws of the State of Maine, for the purpose, among others, of carrying on a mining business in the county of Ouray and State of
82 Colorado, and by certificate dated December 16th, 1885, recorded in Book C–1, page 291, on January 21st, 1886, the said J. M. Jardine afterwards was, as required by the laws of the State of Colorado, duly appointed as the authorized agent of the defendant company, upon whom process might be served.

Second. That during the months of April and May, A. D. 1895, the A. W. Begole Mercantile Company, John Ashenfelter, P. H. Fennell *et al.*, commenced their certain actions in the county court of Ouray county aforesaid against the defendant company above named, and in said actions summons were duly issued and the necessary affidavits and undertakings having been duly given, writs of attachment were duly issued in each of said actions and levied upon the property hereinafter described, and in said actions and each of them the said summons and writs of attachment were duly served upon the defendant company *by delivering the same to the* said J. M. Jardine *as the agent of the defendant company.*

Third. That in said actions, and each of them, judgments were duly had and entered in said court against the defendant company, and on the 23rd day of July, 1895, special execution was duly issued

out of said county court in that certain action in which The A. W. Begole Mercantile Company was plaintiff, and The Cosmopolitan Mining Company was defendant, and said property hereinafter described was duly levied upon, advertised and sold by the then sheriff of Ouray county to one J. C. Marsh as trustee, and a certificate of purchase duly issued to him.

Fourth. That afterwards, the said Marsh, for a valuable consideration, duly assigned said certificate of purchase to one Stephen A. Osborn, and on May 25th 1896, the time of redemption having expired, the then sheriff of Ouray county duly executed and delivered to Stephen A. Osborn a sheriff's deed for the premises hereinafter described.

Fifth. That on June 16th, 1896, the plaintiff herein purchased from the said Stephen A. Osborn for the sum of ten thousand
83 ($10,000) dollars, all of the premises in said sheriff's deed mentioned, to wit: The Yellow Rose Lode mining claim; the Crusader Lode mining claim; the Talisman Lode mining claim; the Hidden Treasurer Lode mining claim; the Gertrude Lode mining claim, and the Emily Lode mining claim, together with the several mill sites patented in connection with said lode mining claims, and each of them, all situate in Imogene basin, in Mt. Sneffles' mining district, in the county of Ouray and State of Colorado, being the premises particularly described in that certain deed of conveyance executed by one Thomas F. Wentworth to the Cosmopolitan Mining Company on July 8th, 1890, which deed is of record in the office of the clerk and recorder of Ouray county aforesaid in Book 57 at page 240, as will appear by said deed conveying said premises from the said Stephen A. Osborn to the plaintiff herein, recorded in Book 62, at page 326, on the 30th day of November, 1896, in the office of the clerk and recorder, of Ouray county aforesaid, being the premises levied upon in the said several writs of attachment issued against the Cosmopolitan Mining Company aforesaid, and duly sold by the sheriff on August the 24th, 1895, as above set forth.

Sixth. That the plaintiff is now in the actual peaceable possession of the above-described premises, and is the owner in fee thereof, and is engaged in working and developing the mining claims aforesaid, and is expending thereon divers large sums of money for the purpose of proving and establishing their value as mining claims aforesaid.

Seventh. That notwithstanding the proceedings in all and each of said actions in said county court were in all respects lawful and valid and within the jurisdiction of said court, and notwithstanding no appeal was taken, or bill of exceptions filed, and the time for so doing has long since elapsed, the defendants and each of them pretend and claim that they still hold some interest in said real property above described, adverse to the said claim of the plaintiff and thereby prevent the plaintiff from obtaining the necessary assistance and capital required for the purpose of developing the same.

84 Wherefore plaintiff prays judgment:

First. That said defendants and each of them may be re-

quired to come into court and specify the nature of their claims and have them finally adjudicated.

Second. That on the final hearing it may be determined that said defendants have not, nor have either of them, any interest, right, title, claim, or demand to the premises above described, or any part thereof.

Third. For general relief.

(Signed) STORY & STEVENS,
Attorneys for Plaintiff.

(Above is duly verified and endorsed.)

Be it further remembered, that on the 5th day of March, A. D. 1897, there was filed in the office of the clerk of said district court, in said cause, a certain answer, in words and figures following, to wit:

STATE OF COLORADO, } *ss:*
County of Ouray, }

In the District Court.

THOMAS F. WALSH, Plaintiff,
vs.
THE COSMOPOLITAN MINING COMPANY and J. M. JARDINE, Defendants.

Now comes the defendant J. M. Jardine, and for answer to the complaint filed herein, says:

First. That the only interest he has had in this matter grows out of the fact that the summons in each of the original actions in the complaint mentioned was served upon him as agent of the defendant company, and that upon said writ being so served upon him, he duly mailed the same to the president of the defendant company, with postage fully paid, in envelopes with return card printed thereon. That said letters were not returned to this defendant, nor was he instructed in any manner by the defendant company, or its officers to defend said actions, nor did he have any knowledge of facts on which said actions could be defended, and *therefor-* allowed judgments in said action to be taken without interposing any defense on the merits. That since the entry of said judgment and the sale of the premises in the complaint thereunder, he has not claimed, nor pretended to claim any interest in said premises adverse to the plaintiff.

Wherefore he prays to be dismissed with his costs.

(Signed) J. M. JARDINE, *Pro Se.*

(Above document is duly verified and endorsed.)

Be it further remembered, that on the 25th day of March, A. D. 1897 there was filed in the office of the clerk of said district court, in said cause, a certain summons, which, with the return endorsed thereon, is in words and figures following, to wit:

STATE OF COLORADO, } ss.:
County of Ouray, }

In the District Court.

THOS. F. WALSH, Plaintiff,
vs.
THE COSMOPOLITAN MINING CO. and J. M. JARDINE, Defendant-. } Summons.

The People of the State of Colorado to The Cosmopolitan Mining Company and J. M. Jardine, the defendant- above named, Greeting:

You are hereby required to appear in an action brought against you by the above-named plaintiff in the district court of Ouray county, State of Colorado, and answer the complaint therein within twenty days after the service hereof, if served within this
8½ county; or, if served out of this county, or by publication, within thirty days after the service hereof, exclusive of the day of service; or judgment by default will be taken against you according to the prayer of the complaint. And if a copy of the complaint in the above-entitled action be not served with this summons, or if the service hereof be made out of this State, then ten days additional to the time bereinbefore specified for appearance and answer will be allowed before the taking of judgment by default as aforesaid.

The said action is brought to obtain a decree quieting the title of plaintiff to the "Yellow Rose" "Crusader," "Talisman," Hidden Treasure, Gertrude and Emily Lode mining claims together with the several mill sites patented in connection with said lode mining claims, all of said mining claims being in Imogene basin in Mt. Sneffles mining district in the county of Ouray and State of Colorado as will more fully appear from the complaint in said action to which reference is here made; and *a copy of which is hereto attached. And you are hereby notified that if you fail to appear and to answer the said complaint as above required, the said plaintiff will enter a default against you and apply to the court for the relief demanded in the complaint.

Given under my hand and the seal of said court, at Ouray, in said county, this first day of March, A. D. 1897.

(Signed) JAS. W. ABBOTT, *Clerk*,
[SEAL.] By JOHN MAQUILKEN, *Deputy*.

(Index.) *A copy of which is hereto attached.

(On the back of the foregoing was the following:)

STATE OF COLORADO, } ss.:
County of Ouray, }

I do hereby certify that I have duly served the within summons* together with a copy of the complaint in the within-stated action,

on this 4th day of March A. D. 1897, by personally deliver-
87 ing a true copy of said summons,* together with a copy of the original complaint in the action therein mentioned, thereto attached, to the within-named defendants The Cosmopolitan Mining Company and the said J. M. Jardine at Ouray in said county. I further certify that the service of the summons and complaint upon the Cosmopolitan Mining Co. was made by delivering to John M. Jardine, the duly authorized agent of the defendant company and designated by it as the person upon whom service should be made, a copy of said summons with a copy of the complaint attached specially for said defendant company.

(Signed) W. J. BENTON, *Sheriff*,
By JOHN MAQUILKEN,
Undersheriff.

(Index.) * Erase if copy of complaint is not served.

(The foregoing document was duly endorsed.)

Be it further remembered, that on the 25th day of March, A. D. 1897, there was filed in the office of the clerk of said court in said cause, a certain præcipe which is in words and figures following, to wit:

STATE OF COLORADO, } *ss.*:
County of Ouray, }

In the District Court within and for said County and State.

THOMAS *T.* WALSH, Plaintiff,
vs.
THE COSMOPOLITAN MINING COMPANY and J. M. JARDINE, Defendants.

To —— ——, clerk of said court:

You will please enter the default of the defendants The Cosmopolitan Mining Company, in the above-entitled cause, and this shall be your warrant therefor.

88 Dated March 25th, 1897.

(Signed) STORY & STEVENS,
Attorneys for Plaintiff.

(The above document was duly endorsed.)

Be it further remembered, that on the 25th day of March, A. D. 1897, there was entered in the default record in the office of the clerk of said district court, in said cause, a certain order in words and figures following, to wit:

THOMAS F. WALSH, Plaintiff,
vs.
THE COSMOPOLITAN MINING COMPANY and J. M. Jardine, Defendants. } 957. In Vacation.

In this action the defendant, The Cosmopolitan Mining Company, having been regularly served with process and having failed to appear and answer the plaintiff's complaint in this behalf, the legal time for answering having expired and no answer, motion, or demurrer having been filed, upon application to the clerk by Story & Stevens, Esquires, attorneys for said plaintiff, the default of said defendant, The Cosmopolitan Mining Company, in the premises is hereby duly entered according to law.

Done in vacation, this 25th day of March, A. D. 1897, by the clerk of said court.

Attest: JAMES W. ABBOTT, *Clerk*,
By F. W. ABBOTT, *Deputy*.

Convenement.

The regular May term of the district court of the seventh judicial district of the State of Colorado, sitting within and for the county of Ouray, convenes at the court-house in the city of Ouray on the 11th day of May, A. D. 1897, there being present the following officers:

Hon. W. H. Gabbert, judge.
89 W. J. Benton, sheriff.
James W. Abbott, clerk,
By F. W. Abbott, deputy.

Be it remembered, that on the 11th day of May, A. D. 1897, it being one of the regular juridical days of the May term, A. D. 1897, of said district court, to wit, the first day of said term, the following order and decree was entered of record in said court in said cause, to wit:

THOMAS *H.* WALSH
vs.
THE COSMOPOLITAN MINING COMPANY and J. M. JARDINE. } 957.

Now on this day this cause comes on to be heard by the court upon the verified complaint of the plaintiff, the answer of the defendant J. M. Jardine and the default of the defendant, The Cosmopolitan Mining Co. duly entered herein for the failure of the said defendant to plead as required by law, after due service of summons upon it in manner and form as by law provided.

And thereupon the said plaintiff was duly sworn as a witness in said cause. And the court having heard the testimony given by him and inspected the records, deeds, and documents offered in evidence, doth find:

First. That the defendant is a corporation organized under the laws of the State of Maine for the purpose, among others, of carrying on a mining business in the county of Ouray and State of Colorado,

and by certificate dated December 16th, 1885, recorded in Book C-1 page 291, on January 21st, 1896, the said J. M. Jardine afterwards was as required by the laws of the State of Colorado, duly appointed as the authorized agent of the defendant company, upon whom process might be served.

Second. That during the months of April and May, A. D.
90 1895, The A. W. Begole Mercantile Company, John Ashenfelter, P. H. Fennell, *et al.*, commenced their certain actions in the county court of Ouray county aforesaid, against the defendant company above named, and in said actions summons were duly issued and the necessary affidavits and undertakings having been duly given, writs of attachment were duly issued in each of said actions and levied upon the property hereinafter described, and in said actions and each of them the said summons and writs of attachment were duly served upon the defendant company by delivering the same to the said J. M. Jardine as the agent of the defendant company.

Third. That in said actions, and each of them, judgments were duly had and entered in said court against the defendant company and on the 23rd day of July, 1895, special execution was duly issued out of said county court in that certain action in which The A. W. Begole Mercantile Company was plaintiff, and The Cosmopolitan Mining Company was defendant, and said property hereinafter described was duly levied upon, advertised, and sold by the then sheriff of Ouray county to one J. C. Marsh, as trustee, and a certificate of purchase duly issued to him.

Fourth. That afterwards, the said Marsh, for a valuable consideration, duly assigned said certificate of purchase to one Stephen A. Osborn, and on May 25th, 1896, the time of redemption having expired, the then sheriff of Ouray county duly executed and delivered to Stephen A. Osborn a sheriff's deed for the premises hereinafter described.

Fifth. That on June 16th, 1896, the plaintiff herein purchased from the said Stephen A. Osborn for the sum of ten thousand ($10,000) dollars all of the premises in said sheriff's deed mentioned, to wit: the Yellow Rose Lode mining claim; the *Cruisader* Lode mining claim; the Talisman Lode mining claim; the Hidden Treasure Lode mining claim; the Gertrude Lode mining claim; and the Emily Lode mining claim, together with the several mill sites patented in connection with said lode mining claims, and each of them, all situate in Imogene basin in Mt. Sneffles mining
91 district, in the county of Ouray and State of Colorado, being the premises particularly described in that certain deed of conveyance executed by one Thomas F. Wentworth to the Cosmopolitan Mining Company on July 8th, 1890, which deed is of record in the office of the clerk and recorder of Ouray county aforesaid, in Book 57, at page 240, as will appear by said deed conveying said premises from the said Stephen A. Osborn to the plaintiff herein, recorded in Book 62, at page 326, on the 30th day of November, 1896, in the office of the clerk and recorder of Ouray county afore-

said, and being the premises levied upon in the said several writs of attachment issued against the Cosmopolitan Mining Company aforesaid, and duly sold by the sheriff on August the 24th, 1895, as above set forth.

Sixth. That the plaintiff is now in the actual peaceable possession of the above-described premises, and is the owner in fee thereof, and is engaged in working and developing the mining claims aforesaid, and is expending thereon divers large sums of money for the purpose of proving and establishing their value as mining claims aforesaid.

Seventh. That notwithstanding the proceedings in all and each of said actions in said county court were in all respects lawful and valid and within the jurisdiction of said court, and notwithstanding no appeal was taken, or bill of exceptions filed and the time for so doing has long since elapsed, the defendant, The Cosmopolitan Mining Co. pretends and claims that it still holds some interest in said real property above described, adverse to the claim of the plaintiff and thereby prevents the plaintiff from obtaining the necessary assistance and capital required for the purpose of developing the same.

It is therefore considered, adjudged, and decreed by the court that the said defendants have not, nor have either of them any right, title, interest, claim or demand in or to any part of the premises above described, and that the pretended claim of the defendant, The Cosmopolitan Mining Company in and to said premises is wholly without right, or justification in law. That the plaintiff is
92 the owner and in the possession of the premises and mining claims above described and entitled to the quiet and peaceable possession of said mining claims and each of them.

It is further considered that the plaintiff pay the costs of this proceeding. And thereupon on application of the plaintiff, permission is given to him to withdraw the documentary evidence offer by him on the trial of this cause.

STORY & STEVENS.

THOMAS F. WALSH
vs.
THE COSMOPOLITAN MINING CO. & J. M. JARDINE. } 957.

To clear title to the Yellow Rose, the Crusader, the Talisman, the Hidden Treasure, the Gertrude, & the Emily lodes, Imogene basin, Ouray Co., Colorado.

Mar. 1, 1897.	Cause ent. & ind. reg. actions.....	20	
	Complaint filed, ent. reg. actions.....	22½	
	Summons issued ent. r. a.....	70	
	Ent. app. pl'ff's att.....	25	
Mar. 4, 1897.	Sum. ret'd f. e. r. a.....	22½	
Mar. 4, 1897.	Cr. by cash from defendant'- att.....	.....	5.00
Mar. 5, 1897.	Disclaimer of interest f. e. r. a.....	.....	22½
" 25, "	Default præc'pe f. e. r. a.....	22½	
	Default ent. def. rec. 1 p. 146.....	70	

May —, 1897.	May term docket	40	
" 11, "	Order ent. & ind. rec. 4—p. 230	2.50	
	Swearing plaintiff	12½	
	Judgment ent. J. B. p. 318	2.50	
	Judgment docket	60	
	General index	1.30	
	Making & ent. fee bill	75	
	Copy decree—certified	2.80	
May 20, 1897.	Cr. by check Story & Stevens	.....	8.50

Memoranda.

March 1, 1897.—Complaint filed.
Sum. issued, Mar. 4, 1897.
Sum. returned, with service on Cosmopolitan M. Co. through J. M. Jardine agent, Mar. —, 1897.
Disclaimer of interest filed by def't J. M. Jardine May 11, 1897.
Judgment ent. in favor of pl'ff granting title to mining premises. Pl'ff to pay costs.

(Written in ink on the bottom of the foregoing was the following:)
Register of actions & Fee Book "C" page 85.

93 *Transcript of Judgment Docket, Ouray County District Court.*

No.	Judgment debtors.	Judgment creditors.	Time of entry.	Judgment book.		Fee book.	
				No.	Page.	Book.	Page.
957	Cosmopolitan Mining Co.	Thos. F. Walsh ..	May 11, 1897	A	318	C	85

(There were also the subheadings "Judgment," "Execution docket," "Motion for new trials and appeals, when taken," "Judgment of appellate court," "Satisfaction of judgment, when entered," and "Remarks," but these did not have anything under them.)

Thomas F. Walsh, plaintiff, *vs.* The Cosmopolitan Mining Co., defendant. State of Colorado, county of Ouray, *ss:* In the district court within and for the county of *of* Ouray aforesaid, the —— term, A. D. 18—.

94 (All of which was duly certified by the clerk of the district court in Ouray county.)

Thereupon, plaintiff by its counsel objected to the order of default, judgment, and transcript in the case of The A. W. Begole Mercantile Company *vs.* The Cosmopolitan Mining Company, Exhibit 9, offered in evidence by the defendant, on the grounds following, viz:

Mr. PERRY: It appears from the uncontested evidence in the case at bar that the plaintiff is a foreign corporation. It appears from the record in the case of The A. W. Begole Mercantile Company *vs.* The Cosmopolitan Mining Company that the judgment in that case

was rendered in pursuance of a personal service of summons upon a supposed agent of the plaintiff, and that there was no other service of summons than such attempted personal service. It appears further that such judgment is by default; that the plaintiff never in any way appeared or submitted to the jurisdiction of the court which rendered the judgment; that it nowhere appears in said record and it is not pleaded by the defendant in the case at bar that the plaintiff was doing business in the State of Colorado when its supposed agent was thus served with process, and that the plaintiff was doing business is an essential jurisdictional averment which must appear affirmatively in the record. Furthermore we object on the ground that it nowhere appears in the record that any process was served upon any person having authority to receive
95 service of process from the defendant, and it nowhere appears in that record that the alleged service was made in Ouray county. We object further that, for the reasons mentioned, to give effect to that judgment would be to deprive us of the property in controversy without due process of law and in contravention of the Federal Constitution.

To the introduction of the orders of default, judgments, and the transcripts in the cases of William C. Fulton (Exhibit 12) John Ashenfelter (Exhibit 8) and P. H. Fennell (Exhibit 11) plaintiff by its counsel made identically the same objections.

To the introduction of the record in the case of Thomas F. Walsh vs. The Cosmopolitan Mining Company (Exhibit 13) in the district court plaintiff by its counsel made the same objections and the further objection that the decree in that case had been rendered in pursuance of a supposed personal service of process, and that it does not require the plaintiff in the case at bar to make a conveyance of the property, but attempts to vest the title to the property in controversy of itself and without requiring the plaintiff to make the conveyance.

Plaintiff by its counsel made the further objection to all of these judgments and proceedings that it does not affirmatively appear from the records offered in evidence that the several courts had jurisdiction to render any judgment and that therefore all of said judgments are without due process of law and in violation of
96 the Constitution of the United States.

Plaintiff by its counsel made the further special objection to the levy of the writ of attachment (Exhibit 10) that the mere levy of a writ of attachment was insufficient to give the court jurisdiction to render a judgment.

The court sustained plaintiff's objection as to the judgments and proceedings in the county court of Ouray county (Exhibits 1, 8, 9, 10, 11, and 12) and overruled said objection as to the decree and proceedings in the district court of Ouray county (Exhibit 13), the opinion of the court being in words following:

The COURT: The questions presented by these objections are important, and it is to be regretted that the court has not had time to examine fully all the authorities cited upon them. Yet on the

principal questions argued I confess I have some opinion and had anterior to the argument. The questions are presented, it seems to me, somewhat different on the suit to quiet title and on the four suits in attachment. However, viewing these attachment suits with reference to the attachment and simply on the question of whether the court had jurisdiction of the person of a foreign corporation by the service of summons on its agent the question would seem to be settled adversely to the defendant by the decision of the judge filed in the case of St. Clair against Cox.

In those suits the character of the agent does not appear.
97 The authority of the agent to receive service of process does not appear. If St. Clair *vs.* Cox means anything it means that that authority of the agent to receive service of process must appear somewhere in the record, not necessarily in the judgment, not even necessarily in the complaint, because the court says it may appear a præcipe for a summons or for a writ of attachment, but that somewhere in the record it must appear that the agent served was authorized, and that if it does not so appear the court of a foreign jurisdiction at least should exclude the judgment; that no presumption should be indulged in sufficient to overcome this return of service on an agent, and that the burden is not on the other side to show that the person served was not in fact an agent, but is on the person offering the testimony to show in the first place that the agent was authorized. The court in considering that says that it should appear that the corporation was doing business within the State and from that it is argued that in every case in which a foreign corporation is sued it must appear that it was doing business within the State. Certain general language used in this opinion would seem to indicate that. But when we view the opinion in the light of the facts presented for decision, I do not so conclude the law to be. In that case it simply appeared that the summons was served on an agent of the defendant corporation. There was no showing that that agent had any express authority to receive service of summons. It was con-
98 tended that he had implied authority because a law of the State made it a condition on a which a corporation could do business in that State that it should be served by serving certain agents. It did not make it a condition expressly, but when the law was considered with reference to the permission to do business it implied that they made that condition. In other words, when the corporation came into that foreign State to do business it did it with notice of the law, of the statute—that the statutes of that State provide that all corporations might be served by serving the process on certain officers; that hence it impliedly consented to be bound in that way. But that implication of consent flowed from simply doing business in the State and would continue just so long as the corporation did business in the State; that that implication of a consent increased the authority of its officers and measured it by what the law provided, such an officer should do and made that officer authorized to receive a service of summons. In such a case of course the authority of the officer to be served flows simply from

the corporation doing business in the State, and in such a case I take it the Supreme Court has held that it must appear somewhere in the record that the corporation was doing business in the State, otherwise while the return of process would show that there was a service on an agent it would not show that the agent was
99 acting within the scope of his authority. One shows the corporation was doing business in the State and the law shows the scope of his authority because the law provides that such agent may be served and that he represents the corporation in that particular. In these attachment suits, without regard to the attachment now, it would appear that the judgments were void because it did not appear by record that the officer served was such an officer as was authorized to receive service and that that would have to appear as a matter of record. It is said that the courts of this State have held that with respect to such judgments the same presumptions are indulged—although the court is proceeding under statute exercising a special statutory jurisdiction—as would be indulged in favor of the judgments under their general jurisdiction. That decision was not in the construction of any State statute but was an enunciation of general principles of law as to which this court is not concluded by the finding of the supreme court of Colorado. But of course this court is concluded by the decisions of the Supreme Court of the United States. I apprehend the theory upon which that decision of the Supreme Court of the United States rested as in the case of Pennoyer *v.* Neff, is this: That where a certain service affirmatively appears no other service is presumed. *Prima facie*, a judgment take- against "A" on a service recited to be on "B" would be void. That the same principle applies to corporations, although they can only be served by serving their agents, and that this pre-
100 sumption of itself being void, flowing from the fact that the service is on some one other than the defendant himself, is only rebutted by showing that the person served stands in such relation to the corporation that his service is the service of the defendant corporation. In other words, that he was authorized by the defendant, either expressly or impliedly, to receive service of summons. The serious question in the case as to these attachment suits, it seems to me, is whether the court has jurisdiction *in rem* or whether that court had jurisdiction *in rem*, and whether the suit, notwithstanding the lack of service on the defendant, could proceed *in rem*. On that question I confess I have had very serious doubt and my mind is not yet free from doubt about it. The language used in Cooper *v.* Reynolds is certainly broad enough to hold that these judgments are not void so far as they are to be considered as judgments against property and so far as they subjected the property to the satisfaction of the judgments; that the one essential thing to create jurisdiction would be the seizure of the property. The facts in Cooper *v.* Reynolds do not differ in a very marked degree from the facts shown. The statutes of Tennessee provide for the service of summons by publication and for the attachment of the property by filing in a certain office the notice of that attachment and for the service on the defendant of a notice of the attachment. If the defendant could not

be found it provided for the publication of that notice of attach-
101 ment. Now in Cooper *v.* Reynolds there was no showing whatsoever in the record and no claim made that the summons itself was ever served. The return on the summons was that the defendant could not be found but there was no order of publication at all, no attempt to serve the summons. There was an order of publication as to notice of attachment. No proof of that publication was found in the record, but the court in its decree in its judgment of that case, found as a fact that the publication of this attachment notice had been made in accordance with a formal order of the court. That fact is not given any great prominence in the decision. Judge Miller in the decision throughout treats the case as depending on the seizure of the property but the question remains, What is the seizure of that property? Was it the filing of the notice in the office of the county recorder or any special office, or were both steps necessary to constitute an attachment or seizure of the property? In these cases there is no physical seizure of the real estate. The acts provided by the statute for the attachment are simply an equivalent to that seizure. The Colorado statute, as the Tennessee statute, seems to provide the two acts,—the filing of the notice and the service of the notice. When that is done the seizure of the property, I take it, is complete. This is also my construction of the decision of the supreme court of Colorado, quoted in 12 Colo., that the attachment itself
is not complete, the seizure of the property. The property
102 is not brought within the jurisdiction of the court so far as to authorize the court to proceed to the condemnation of that property until not only the notice is filed, but the notice is served, not the summons in the action but the attachment notice, notice that the property is attached,—and that judgment proceedings in the absence of such completed attachment would be void. It would follow from that that these judgments would have to be treated as void in this court. It must be remembered that nothing but the judgments and the attachments are offered. The court is not authorized to look at the complaint to see whether it did as a matter of fact appear in this proceeding that the corporation was doing business; that might be a question that is open to debate as to whether it did not appear in the complaints, but those complaints are not offered,—but that is the complaint in three of the suits. And I am inclined to sustain the objection to the parts of these attachment suits that are offered in evidence. With the suit to quiet title I reach a different conclusion. The provision, I think, as to the corporation or the necessity for showing by the record that the corporation is doing business in the State, is simply for the purpose of showing the authority of the agent who was in fact served. There was never any difficulty about a foreign corporation voluntarily entering its appearance in any suit in any foreign jurisdiction;
it always had a right to do that. If such foreign corporation
103 was authorized by its charter to execute a promissory note it had a right to execute a judgment note, that is, a note authorizing its appearance to be entered and a judgment taken. I see no

objection to such foreign corporation agreeing in advance that its appearance should not be entered in a certain way *nor* that it should be bound by a certain service, the service resting on the agreement of the corporation. In the suit to quiet title it appears by the decree of the court that this corporation was organized to do business in the State of Colorado, that that was one was of the objects for which it was organized; that it did appoint an agent under the law of Colorado who was authorized by the corporation to receive service of process. So the authority of this agent to receive this service appears affirmatively on the face of this record. The corporation is found where its agents are found. It is true that if the agent is casually in the State and is not there in his capacity of agent he does not represent the corporation. But it appears affirmatively in this record that this agent is here in his capacity as agent. He was authorized by the corporation to receive service of process in the State of Colorado—that is the allegation—and that the corporation was by its charter not only authorized but was formed for the very purpose of carrying on a part of its business in the State of Colorado. I think it sufficiently appears in this suit to quiet title that the court has jurisdiction of the defendant.

104 It is true that the defendant is not concluded by the recitals in this decree, but there is no evidence before the court contradicting him. The plaintiff in this suit rests simply upon the fact and on the presumptions resulting from the fact that it was a foreign corporation. It is said that this judgment decree is void for another reason; that the court could only proceed *in personam*, and it could not decree the legal title out of the defendant and in the plaintiff. That was not what the court attempted to do. The court attempted to quiet the legal title in the plaintiff already vested in the plaintiff against claims of the defendant; that the court charged in substance. The fact of where the legal title was was litigated between these parties; it cannot be relitigated in any other court. It is conclusively determined by the finding here, assuming that the court had jurisdiction, and the court did not assume by its decree to take the legal title out of the defendant, and, by virtue of the decree alone, transfer it to the plaintiff; that was not the character of the suit. The objection will be overruled as to the record in the case to quiet title.

To which action of the court in refusing to admit Exhibits 1, 8, 9, 10, 11, and 12, the defendant by his counsel then and there duly excepted, and to which action of the court in admitting Exhibit 13, the plaintiff by its counsel then and there excepted.

105 The defendant by his counsel thereupon reoffered Exhibits 1, 8, 9, 10, 11, and 12, supplementing the said exhibits by offering a complete record of all of the proceedings of the county court in each of said causes (with the exception of Plaintiff's Exhibit R, hereinafter mentioned).

The supplement in the record in Exhibit 8 (which supplement is

[* Interlined in pencil in copy.]

now marked Exhibit 20, for convenience, although at the time of the trial it was not given a new number) consists of the following documents.

EXHIBIT 20.

STATE OF COLORADO, } ss:
County of Ouray, }

In the County Court.

JOHN ASHENFELTER, Plaintiff,
vs.
THE COSMOPOLITAN MINING COMPANY, a Corporation, Defendant. } Complaint.

Plaintiff complains and alleges:

I. That the amount involved in this action and for which relief is sought does not exceed the sum of two thousand dollars.

II. That the defendant is a corporation duly incorporated and organized under and by virtue of the laws of the State of Maine, with its principal office in the State of Colorado, at the city of Ouray in said Ouray county. And by way of complaint against the defendant the plaintiff alleges:

I. That on or about the 31st day of December, A. D. 1894, the defendant was indebted to the plaintiff in the sum of $47.90 for and upon an account for work and labor done and performed
106 and services rendered by the plaintiff for said defendant at defendant's special instance and request between the 1st day of June, 1894, and the date last aforesaid, which should have been paid for at the completion of such work.

II. That the said sum of $47.90 has not been paid nor any part thereof, and the same is now due and owing from defendant to this plaintiff, together with interest thereon at the rate of 8 % per annum from the 31st day of December, 1894.

III. That on or about the 26th day of April, 1895, suit was commenced against the defendant herein by the A. W. Begole Mercantile Company in this court, wherein a writ of attachment was issued out of this court and a levy made thereunder by the sheriff of said Ouray county attaching all of the real property of the said defendant found in said county.

Therefore plaintiff asks:

1. For judgment against the defendant herein for the said sum of $47.90, together with interest thereon from the 31st day of December, 1894, at 8 % per annum.

2. That he may be made a party plaintiff in the said suit hereinabove mentioned and be given like remedies against the defendant herein as the law gives to the original plaintiff in the said action.

3. For costs of this action, and for general relief.

(Signed) EMERSON & BRADSHAW,
Attorneys for the Plaintiff.

(Above document is duly verified, and endorsed.)

STATE OF COLORADO, } ss:
County of Ouray, }

In the County Court within and for the County of Ouray Aforesaid — the —— Term, A. D. 18—.

107 JOHN ASHENFELTER, Plaintiff,
versus
THE COSMOPOLITAN MINING CO., a Corporation, Defendant.

John Ashenfelter of said county, being duly sworn, doth depose and say that the Cosmopolitan Mining Co. against whom the said —— —— is about to sue out an attachment is indebted to him in a sum not exceeding twenty hundred dollars, to wit, the sum of forty-seven and 90/100 dollars; and that the said demand is now due and owing and that sum is due from defendant to plaintiff for and upon an account for work and labor done and performed and services rendered by plaintiff for defendant at defendant's special instance and request, between June 1st, 1894, and December 1st, 1894, which should have been paid for at the completion of such work; with interest from Dec. 31st, 1894, at 8 % per annum.

(Signed) JOHN ASHENFELTER.

Sworn and subscribed to before me this 21st day of May, A. D. 1895.

ROB'T H. WILSON,
Judge and Clerk,
[SEAL.] By MARY F. WILSON,
Dep. Clerk.

(Above document was duly endorsed.)

STATE OF COLORADO, } ss:
County of Ouray, }

In the County Court of the State of Colorado Sitting within and for the County of Ouray.

108 JOHN ASHENFELTER, Plaintiff,
vs.
COSMOPOLITAN MINING COMPANY, a Corporation, Defendant. } Undertaking on Attachment.

Whereas, the above-named plaintiff has commenced, or is about to commence an action in the county court within and for the county of Ouray against the above-named defendant, upon a contract for the direct payment of money, claiming that there is due to the said plaintiff from the said defendant the sum of forty-seven and 90/100 dollars lawful money of the United States, besides interest, and said plaintiff is about to apply for an attachment against the property of the said defendant as security for the satisfaction of any judgment that may be recovered therein

Now, therefore, we, the undersigned residents of the county of Ouray State of Colorado, in consideration of the premises, and of the

issuing of said attachment, do jointly and severally undertake in the sum of one hundred ten dollars lawful money and promise to the effect that if the said defendant recover judgment in said action, or if the said court shall finally decide that the said plaintiff was not entitled to an attachment, the said plaintiff will pay all costs that may be awarded to the said defendant and all damages which it may sustain by reason of the wrongful suing out of the said attachment, not exceeding the sum of one hundred ten dollars. Dated this 21st day of May, A. D. 1895.

(Signed) JOHN ASHENFELTER.
(Signed) GOE M. SEEGER.

(On the back of the foregoing document was a form of jurat but it was not filled out. The document was duly endorsed.)

109 STATE OF COLORADO, } ss:
County of Ouray, }

In the County Court.

JOHN ASHENFELTER, Plaintiff,
vs.
COSMOPOLITAN MINING CO., a Corporation, Defendant. } Summons.

The People of the State of Colorado to Cosmopolitan Mining Co., the defendant above named, Greeting:

You are hereby required to appear in an action brought against you by the above-named plaintiff, in the county court, of Ouray county, State of Colorado, and answer the complaint therein within twenty *twenty* days after the service hereof if served within this county; or if served out of this county, or by publication, within thirty days after the service hereof, exclusive of the day of service; or judgment by default will be taken against you according to the prayer of the complaint.

And if a copy of the complaint in the above-entitled action be not served with this summons, or if the service hereof be made out of this State, then ten days additional to the time hereinbefore specified for appearance and answer will be allowed before the taking of judgment by default as aforesaid.

The said action is brought to recover from the defendant the sum of $47.90, with interest from December 31st, 1894, at 8 % per annum, amount alleged to be due from the defendant to plaintiff on account of work and labor done and performed and services rendered by plaintiff for defendant, at its special instance and request, between the 1st day of June, 1894, and the 31st day of December, 1894, as will more fully appear from the complaint in said action to which reference is here made:*

110 And you are hereby notified that if you fail to appear, and to answer the said complaint as above required, the said plaintiff will take judgment by default against you in accordance with the prayer of said complaint.

Given under my hand and the seal of said court at Ouray in said county, this 21st day of May, A. D. 1895.

ROB'T H. WILSON,
Judge and Clerk,
By MARY F. WILSON,
Dep. Clerk.

[SEAL.]

(Index) *A copy of which is hereto attached.

STATE OF COLORADO, } ss:
County of San Miguel, }

I do hereby certify that I have duly served the within summons together with a copy of the complaint in the within-stated action, on this 23rd day of May, A. D. 1895, by personally delivering a true copy of said summons, together with a copy of the original complaint in the action therein mentioned, thereto attached to the within-named defendant J. M. Jardine, duly authorized agent for the within-named defendant company.

J. C. RUTAN, *Sheriff.*

(The foregoing document was duly endorsed)

STATE OF COLORADO, } ss:
County of Ouray, }

In the County Court of the State of Colorado within *in* and for the County of Ouray.

JOHN ASHENFELTER, Plaintiff,
vs.
COSMOPOLITAN MINING CO., a Corporation, Defendant. } Writ of Attachment.

111 The People of the State of Colorado to the sheriff of the county of San Miguel, Greeting:

Whereas, *in* the above-entitled action was commenced in the county court of the State of Colorado in and for the said county of Ouray, by the plaintiff in the said action to recover from the defendant Cosmopolitan Mining Co. in the said action, the sum of forty-seven and 90/100 dollars, lawful money of the United States, besides interest at the rate of 8 per cent. per annum from the 31st day of December, A. D. 1894, and costs of suit; and the necessary affidavit and undertaking herein having been filed as required by law,

Now, we do therefore command you —— ——, the said sheriff, that you serve a copy hereof on the above defendant, if he *it* be found in your county, and also attach and safely keep all the property of said defendant within your said county, not exempt from execution, or so much thereof as may be sufficient to satisfy the said plaintiff's demand, as above, and in the affidavit herein mentioned,

unless the said defendant deposit with you the amount or give you security by an undertaking of at least two sufficient securities, in an amount sufficient to satisfy such demand, besides costs, or in an amount equal to the value of the property which has been or is about to be attached in which case you will take such undertaking; and hereof make due and legal service and return.

Witness, Rob't H. Wilson, judge & clerk of said court, [SEAL.] and the seal thereof, at Ouray, this 21st day of May, A. D. 1895.

(Signed) ROB'T H. WILSON,
Judge & Clerk,
By MARY F. WILSON,
Deputy Clerk.

112 STATE OF COLORADO, } ss:
San Miguel County, }

I do hereby certify that I have duly executed the within writ on this 23rd day of May, A. D. 1895, by delivering a true copy of the within to J. M. Jardine, duly authorized agent for the within-named defendant company.

J. C. RUTAN, *Sheriff.*

(The foregoing document was duly endorsed.)

OURAY, COLO., *May* 20, 1895.

M—Cosmopolitan Mg. Co., Hidden Treasure mine, to John Ashenfelter, Dr.

Forwarding and commission house, hay and grain.

For hauling supplies to Hidden Treasure mine & use of pack animals—during the months of June, July and December, 1894, 47.90.

STATE OF COLORADO, } ss:
Ouray County, }

In the County Court of the State of Colorado within and for the County of Ouray.

JOHN ASHENFELTER, Plaintiff,
vs.
COSMOPOLITAN MINING CO., a Corporation, Defendant. } Writ of Attachment.

113 The People of the State of Colorado to the sheriff of the said county of Ouray, Greeting:

Whereas, the above-entitled action was commenced in the county court of the State of Colorado in and for the said county of Ouray, by the plaintiff in the said action, to recover from the defendant Cosmopolitan Mining Co. in the said action the sum of forty-seven

and 90/100 dollars, lawful money of the United States, besides interest at the rate of 8 per cent. per annum from the 31st day of December, A. D. 1894, and costs of suit; and the necessary affidavit and undertaking herein having been filed as required by law;

Now, we do therefore command you —— ——, the said sheriff, that you serve a copy hereof on the above defendant, if it be found in your *county*, and also attach and safely keep all the property of said defendant within your said county, not exempt from execution or so much thereof as may be sufficient to satisfy the said plaintiff's demand, as above, and in the affidavit herein mentioned, unless the said defendant deposit with you the amount or give you security by an undertaking of at least two sufficient sureties, in an amount sufficient to satisfy such demand, besides costs or in an amount equal to the value of the property which has been or is about to be attached, in which case you will take such undertaking; and hereof make due and legal service, and return.

Witness: Rob't H. Wilson, judge & clerk of said court,
[SEAL.] and the seal thereof, at Ouray, this 21st day of May, A. D. 1895.

(Signed) ROBT H. WILSON,
Judge and Clerk.
By MARY F. WILSON,
Deputy Clerk.

STATE OF COLORADO, } ss:
Ouray County, }

114 I do hereby certify that I have duly executed the within writ on this 22nd day of May, A. D. 1895, by levying upon and attaching all the right, title, interest, claim and demand and equity of redemption of the Cosmopolitan Mining Company in and to the following real property, to wit the Yellow Rose lode, the Crusader lode, the Norma lode, the Talisman lode and the Hidden Treasure lode, the Gertrude lode and the Emily Lode mining claims, situate in Imogene basin, *Mt.* Sneffles mining district, county of Ouray and State of Colorado, and also the mill sites and each and every of them in said basin, district, county, and State, to said lodes and each and every of them belonging, which said lodes and mill sites are more accurately described in detail and identified by metes and bounds in the book of record in and for the recorder's office of the said county of Ouray and State of Colorado, and to which reference is hereby made. And I further certify that I have filed a true copy of this levy and attachment for record with the clerk and recorder in and for said Ouray county, Colorado.

MAURICE CORBETT, *Sheriff.*

(The foregoing document was duly endorsed.)

STATE OF COLORADO, } ss:
County of Ouray, }

The People of the State of Colorado to the sheriff of Ouray county, Greeting:

Whereas, by virtue of a certain writ of attachment, issued out of our county court on the 21 day of May, A. D. 1895, and that on the 22d day of May, 1895, you levied upon the "Yellow Rose" lode; "Crusader" lode; "Norma" lode; "Talisman" lode; "Hidden Treasure" lode; "Gertrude" lode; and "Emily" lode; situate in Imogene basin, Mt. Sneffles mining district county & State aforesaid, also the mill sites thereof, more particularly described in the location certificates thereof, of record with the clerk and
115 recorder of said Co. and State as the property of the Cosmopolitan Mining Co. as appears by your certificate of levy, filed and recorded in this office; and

Whereas, afterward, to wit, on the 27" day of June, A. D. 1895, by the consideration of our county court, John Ashenfelter recovered judgment against the said The Cosmopolitan Mining Co. for the sum of forty-nine 82/100 dollars damages, and also the further sum of twenty-two 70/100 dollars, costs of suit, as appears of record.

We therefore command you, that you immediately proceed to sell the property by you levied upon, as hereinbefore described, or so much thereof as is necessary to make the aforesaid sums of money, with interest on said judgment from the day of the rendition of the same; and have the same money ready as soon as may be, to render unto the said court for adjustment among the several judgment creditors in proportion to the amount of their respective claims according to law.

Hereof fail not, and make return of this writ, with your doings indorsed thereon in ninety days from the date hereof.

Witness, Rob't H. Wilson, judge and clerk of said
[SEAL.] county court, and the seal thereof hereto affixed, at Ouray, this 23" day of July, A. D. 1895.

ROBT H. WILSON,
Judge & Clerk,
By —— ——, *Deputy.*

STATE OF COLORADO, } ss:
County of Ouray, }

I hereby return the within execution fully satisfied in accordance with my return made on the execution issued in the case of the A. W. Begole Mercantile Company *vs.* The Cosmopolitan Mining Company.

MAURICE CORBETT, *Sheriff.*

116 (The foregoing document was duly endorsed.)

STATE OF COLORADO, } ss:
Ouray County, }

In the County Court in and for said County.

JOHN ASHENFELTER, Plaintiff,
—
COSMOPOLITAN MNG. CO., Defendant. } Precipe for Execution.

To Rob't H. Wilson, judge & clerk of said court:

You will please issue special execution in the above-entitled cause, and this shall be your warrant therefor.

Dated this 23rd day of July, A. D. 1895.

(Signed) EMERSON & BRADSHAW,
Plaintiff's Attorney.

(The foregoing document was duly endorsed.)

(Then follow the default and judgment which have appeared hereinbefore as part of Exhibit 8.)

In the Ouray County Court, —— Term, A. D. 18—.

No.	Parties.	Action.	Attorneys.
1439	John Ashenfelter *v.* Cosmopolitan Mining Company, a corporation.	Attachment on account.	Emerson and Bradshaw.

Date.	Papers filed, &c.	Plaintiff's costs.			Memoranda.
		Clerk's.	Sheriff's.	Credits.	
May 21	To filing complaint & affidavit	37½			Judgment.'
	" filing and approving bond	112½			
	" affidavit and filing	37½			
	" issuing summons and	100			
	2 attachment writs & cop-es of same	310			
	" index	10			
	" fee bill	75			
117	" 2 dockets	40			
	" appearance	25			
May 28	To filing 2 papers	25	772½		
" 31	By cash			600	
June 27	To hearing	4			
	" default	60			
	" judgment	80			
	" swearing witness	12½			
	" trans. on J. D.	60	1385		
	" filing paper	12½			
	By cash			797½	
July 23	To execution and precipe	262		262	
1900.					
Oct. 31st	Transcript	976¼		976¼	

(Fee Book "C," page 294.)

(Then follows the transcript of the judgment docket which has appeared hereinbefore as part of Exhibit 8.)

(All of which was duly certified by the clerk of the county court of Ouray county.)

The supplement in the record in Exhibit 9 (which supplement is now marked Exhibit 19, for convenience, although at the time of the trial it was not given a new number) consists of the following documents.

EXHIBIT 19.

STATE OF COLORADO, } ss:
County of Ouray, }

In the County Court Thereof.

THE A. W. BEGOLE MERCANTILE COMPANY, a Corporation, Plaintiff,
vs.
THE COSMOPOLITAN MINING COMPANY, a Corporation, Defendant.
} Complaint.

The plaintiff complains and alleges:

I. That the amount involved in this action for which relief is sought does not exceed the sum of two thousand dollars.

118 II. That the plaintiff is a corporation duly incorporated and organized under and by virtue of the laws of the State of Colorado and at all times hereinafter mentioned has been such corporation doing business in the city of Ouray, county of Ouray and State aforesaid.

III. That the defendant is a corporation duly incorporated and organized under and by virtue of the laws of the State of Maine, with its principal office in the State of Colorado at Ouray, in said Ouray county.

And for a first cause of action against the defendant the plaintiff alleges:

I. That on or about the 24th day of July, 1894, the defendant was indebted to plaintiff for and upon an account for goods, wares, and merchandise sold and delivered by plaintiff to defendant, at defendant's special instance and request, in the sum of $137.32, said goods, wares, and merchandise being furnished between the 8th day of May, 1894, and the date last aforesaid.

II. That the said sum of $137.32 has not been paid nor any part thereof, and the same is now due and owing from defendant to plaintiff, together with interest thereon at the rate of eight per cent. per annum from the said 24th day of July, 1894.

And for a second cause of action against the defendant the plaintiff alleges:

I. That on or about the 1st day of January, 1895, the defendant was indebted to the San Juan Hardware Company, a corporation doing business in the said city and county of Ouray, in the sum of

$75.70, for and upon an account for goods, wares, and merchandise sold and delivered by the said San Juan Hardware Company to the defendant, at defendant's special instance and request, between the 17th day of May, 1894, and the date last aforesaid.

II. That on or about the 25th day of April, 1895, the said
119 The San Juan Hardware Company, assigned, transferred, and set over to this plaintiff said account for collection.

III. That the said sum of $75.70 has not been paid nor any part thereof, and the same is now due and owing from the defendant together with interest thereon at the rate of eight per cent. per annum from the 1st day of January, 1895.

Wherefore plaintiff demands judgment against the defendant.

1. For the sum of $137.32, together with interest thereon from the 24th day of July, 1894, as in the first cause of action herein set forth.

2. For the sum of $75.70, together with interest thereon from the 1st day of January, 1895, as in the second cause of action herein set forth.

3. For costs of suit, and for such other relief as to this court may seem meet and proper.

(Signed) EMERSON & BRADSHAW,
Attorneys for the Plaintiff.

(Above document was duly verified, and endorsed.)

STATE OF COLORADO, } ss:
Ouray County, }

In the County Court in and for the County of Ouray, in the State Aforesaid.

THE A. W. BEGOLE MERCANTILE Company, a Corporation, Plaintiff, vs. THE COSMOPOLITAN MINING Company, a Corporation, Defendant. } Undertaking on Attachment.

Whereas, the above-named plaintiff has commenced, or is about to commence an action in the county court in and for the county of Ouray in the State aforesaid, against the above-named defendant, upon a contract for the direct payment of money, claim-
120 ing that there is due to the said plaintiff from the said defendant the sum of two hundred thirteen and 02/100 dollars lawful money of the United States, besides interest, and is about to apply for an attachment against the property of the said defendant as security for the satisfaction of any judgment that may be recovered therein.

Now, therefore, we the undersigned, residents of the county of Ouray, State of Colorado, in consideration of the premises, and of the issuing of said attachment, do jointly and severally undertake in the sum of four hundred seventy-five dollars and promise to the effect, that if the said defendant recover judgment in said action, or if the said court shall finally decide that the said plaintiff was not

entitled to an attachment, the said plaintiff will pay all costs that may be awarded to the said defendant and all damages which it may sustain by reason of the wrongful suing out of the said attachment, not exceeding the sum of four hundred seventy-five dollars.

Dated this 26th day of April, A. D. 1895.

(Signed) A. W. BEGOLE MERC. CO.
(Signed) J. C. MARSH, *Pres't.*
J. C. LANGLEY.

(On the back of the foregoing document was a form of jurat, but same was not filled out. Document was duly endorsed.)

STATE OF COLORADO, } ss:
County of Ouray, }

In the County Court within and for the County of Ouray Aforesaid.

THE A. W. BEGOLE MERCANTILE COMPANY, a Corporation, Plaintiff,
versus
THE COSMOPOLITAN MINING COMPANY, a Corporation, Defendant.

121 J. C. Marsh, president of the plaintiff corporation of said county, being duly sworn, doth depose and say that The Cosmopolitan Mining Company against whom the said The A. W. Begole Mercantile Company is about to sue out an attachment is indebted to him in a sum not exceeding twenty hundred dollars, to wit, the sum of two hundred thirteen and 02/100 dollars with interest; and that the said demand is now due and owing, and that sum is due and owing from the defendant to the plaintiff for and upon an overdue book account for goods, wares, and merchandise sold and delivered by the plaintiff to the defendant, at defendant's special instance and request, between the 8th day of May 1894, and the 24th day of July, 1894, amounting to $137.32; and upon an overdue book account for goods, wares, and merchandise sold and delivered by the San Juan Hardware Company to defendant at defendant's special instance and request, between the 17th day of May, 1894, and the 1st day of January, 1895, amounting to $75.70, and by the said The San Juan Hardware Company assigned to the plaintiff herein for collection.

(Signed) J. C. MARSH.

Sworn and subscribed to before me this 26th day of April, A. D. 1895.

ROB'T H. WILSON,
Judge & Clerk,
By MARY F. WILSON,
Dep. Clerk.

[SEAL.]

(Above document was duly endorsed.)

(Then follows the writ of attachment and the return thereon, which has appeared hereinbefore as part of Exhibit 10.)

STATE OF COLORADO, } ss:
County of Ouray, }

In the County Court.

122 THE A. W. BEGOLE MERCANTILE COMPANY, a Corporation, Plaintiff,
vs.
THE COSMOPOLITAN MINING COMPANY, a Corporation, Defendant. } Summons.

The People of the State of Colorado to The Cosmopolitan Mining Company, a corporation, the defendant above named, Greeting:

You are hereby required to appear in an action brought against you by the above-named plaintiff in the county court of Ouray county, State of Colorado, and answer the complaint therein within twenty days after the service hereof, if served within this county; or, if served out of this county, or by publication, within thirty days after the service hereof, exclusive of the day of service; or judgment by default will be taken against you according to the prayer of the complaint. And if a copy of the complaint in the above-entitled action be not served with this summons, or if the service hereof be made out of this State, then ten days additional to the time hereinbefore specified for appearance and answer will be allowed before the taking of judgment by default as aforesaid.

The said action is brought to recover the sum of $137.32, with interest for goods, wares, and merchandise sold and delivered by plaintiff to defendant; and the further sum of $75.70, with interest for goods, wares, and merchandise sold and delivered by the San Juan Hardware Company to defendant, and by the said hardware company assigned to this plaintiff for collection and for costs of suit, as will more fully appear from the complaint in said action to which reference is here made: *

And you are hereby notified that if you fail to appear, and
123 to answer the said complaint as above required, the said plaintiff will take judgment by default against you in accordance with the prayer of said complaint.

[SEAL.] Given under my hand and the seal of said court at Ouray in said county, this 29th day of April, A. D. 1895.

ROB'T H. WILSON,
Judge & Clerk.
MARY F. WILSON,
Dep. Clerk.

(Index) *A copy of which is hereto attached.

STATE OF COLORADO, } ss:
County of San Miguel, }

I do hereby certify that I have duly served the within summon-, together with a copy of the complaint in the within-stated action, on this 7th day of May, A. D. 1895, by personally delivering a true

copy of said summons, together with a copy of the original complaint in the action therein mentioned, thereto attached, to J. M. Jardine, the duly authorized agent of the within defendant company.

J. C. RUTAN, *Sheriff.*

(The foregoing document was duly endorsed.)

STATE OF COLORADO, } ss:
County of Ouray, }

In the County Court within and for the County of Ouray, State of Colorado.

THE A. W. BEGOLE MERCANTILE COMPANY, a Corporation, Plaintiff,
vs.
THE COSMOPOLITAN MINING COMPANY, a Corporation, Defendant.
} Writ of Attachment.

124 The People of the State of Colorado to the sheriff of the county of San Miguel, Greeting:

Whereas, the above-entitled action was commenced in the county court in and for the said county of Ouray in the State of Colorado, by the plaintiff in the said action to recover from the defendant Cosmopolitan Mining Co. in the said action the sum of two hundred thirteen and 02/100 dollars, lawful money of the United States, besides interest at the rate of 8 per cent. per annum from the — day of —— A. D. 189–, and costs of suit; and the necessary affidavit and undertaking herein having been filed as required by law.

Now, we do therefore command you, the said sheriff that you serve a copy hereof on the above defendant if he be found in your county, and also attach and safely keep all the property of said defendant Cosmopolitan Mining Co. within your said county, not exempt from execution, or so much thereof as may be sufficient to satisfy the said plaintiff's demand, as above mentioned; unless the said defendant deposit with you an amount, or give you security by an undertaking of at least two sufficient sureties, in an amount sufficient to satisfy such demand, besides costs, or in an amount equal to the value of the property which has been or is about to be attached; in which case you will take such undertaking and hereof make due and legal service and return.

Witness my hand as the clerk of said court, and the seal thereof at Ouray this 29th day of April, A. D. 1895.

ROB'T H. WILSON,
Judge & Clerk,
By MARY F. WILSON,
Deputy Clerk.

STATE OF COLORADO, } ss:
San Miguel County, }

I do hereby certify that I have duly executed the within writ on this 7th day of May, A. D. 1895, by delivering a true copy of the

within writ to J. M. Jardine, the duly authorized agent of the within defendant company.

J. C. RUTAN, *Sheriff.*

125 (The foregoing document was duly endorsed.)

(Then follows motion to quash service of summons, which appears in full in the rebuttal testimony as Exhibit R.)

STATE OF COLORADO, } ss:
Ouray County, }

In the County Court in and for said County.

THE A. W. BEGOLE MERCANTILE COMPANY, a Corporation, Plaintiff,
—
COSMOPOLITAN MINING COMPANY, a Corporation, Defendant. } Default and Judgment.

The defendant Cosmopolitan Mining Company, having failed to appear and answer, move or demur to the complaint in this action, according to law, as required by the summons, the plaintiff hereby applies for default and entry of judgment.

Dated this 14th day of June, A. D. 1895.

To Rob't H. Wilson, judge of said court.

(Signed) EMERSON & BRADSHAW,
Plaintiff's Attorney.

(The foregoing default and judgment was duly endorsed.)

M—Hidden Treasure M'n'g Co. bought of the A. W. Begole Mercantile Co., grocers.

Terms cash.

1894.		
7/23.	To mdse. as per bill rendered	137.32
	Interest to date	8.25
		145.57

(Lead pencil.)
May 9 to July 23 '94 incl.

(Lead pencil.)	137.32
	75.70
	213.02

126 (On the back of this document was the endorsement.)

665. OURAY, COLO., *April* 25, 1895.

M—Hidden Treasure Mining Co. bought of the San Juan Hardware Co.—Alva Adams, president; Wm. Bayly, manager—manufacturers of copper & tinware; miners' supplies and agents for Hercules & giant powders.

Durango.	Ouray.		Telluride.
Mdse. from May 18th, '94	.....	75.70	
Interest to date	.....	9.45	
		85.15	

We hereby assign the above account to the Begole Mer. Co. for collection.

(Signed) SAN JUAN HARDWARE CO.

(On the back of this document was the endorsement.)

(Then follows levy of writ of attachment, which has appeared hereinbefore as part of Exhibit 10.)

STATE OF COLORADO, } ss:
Ouray County, }

The People of the State of Colorado to the sheriff of Ouray county, Greeting:

Whereas, by virtue of a certain writ of attachment, issued out of our county court on the 26 day of April, A. D. 1895, and that on the 26 day of April 1895, you levied upon the "Yellow Rose" lode; "Crusader" lode; "Norma" lode; "Talisman" lode; "Hidden Treasure" lode; "Gertrude" lode; and "Emily" lode, in Imogene basin Mt. Sneffles mining district said Co. and State. Also the mill sites thereof. Particularly described in the location certificates thereof, on record with the clerk and recorder of said county and State as the property of the Cosmopolitan Mining Company
127 as appears by your certificate of levy, filed and recorded in this office; and whereas, afterward, to wit, on the 27 day of June, A. D. 1895, by the consideration of our county court, the A. W. Begole Mercantile Co. recovered judgment against the said The Cosmopolitan Mining Company for the sum of two hundred twenty-six 09/100 dollars, damages, and also the further sum of twenty-four 58/100 dollars, costs of suit, as appears of record.

We therefore command you, that you immediately proceed to sell the property by you levied upon, as hereinbefore described or so much thereof as is necessary to make the aforesaid sums of money, with interest on said judgment, from the day of the rendition of the same; and have the same money ready, as soon as may be, to render unto the said court for adjustment according to law allowing the several judgment creditors in proportion to the amount of their several claims as adjusted.

Hereof fail not and make return of this writ, with your doings endorsed thereon in ninety days from the date hereof.

Witness, Rob't H. Wilson, judge and clerk of said county court and the seal thereof at Ouray this 23 day of July, A. D. 1895.

[SEAL.] ROB'T H. WILSON,
Judge and Clerk.

STATE OF COLORADO, } ss:
Ouray County, }

In obedience to the command of the within execution, I have executed the within writ by offering for sale on the 24th day of August, 1895, in the manner provided by law, and selling the property described in said writ, at public sale at the front door of the court-house in the city and county of Ouray, Colo., that said mining claims were first offered for sale separately; receiving no bids on said claims I offered the same for sale all together. That in accordance with an agreement entered into by and among the several prorating judgment creditors, the same was struck off and sold to J. C.
128 Marsh, as trustee, for the several judgment creditors for the sum of $1616.97; and I therefore return this execution fully satisfied.

(Signed) MAURICE CORBETT, *Sheriff.*

(The foregoing document was duly endorsed.)

(Then follows the default and judgment which has appeared hereinbefore as part of Exhibit 9.)

STATE OF COLORADO, } ss:
Ouray County, }

In the County Court.

THE A. W. BEGOLE MERC. CO., Plaintiff,
vs.
THE COSMOPOLITAN MINING CO., Defendant. } Prorating Order.

Now on this day this cause comes on to be heard on motion of Emerson & Bradshaw, attorneys for the above-named plaintiff, for an order prorating the amount to be realized from the sale of the attached property by the several attaching and judgment creditors, and it appearing to the court that the following judgments have been rendered and entered against the Cosmopolitan Mining Co. under and by virtue of the several attachments issued out of this court as follows, to wit:

The A. W. Begole Merc. Co. $226.09, John Ashenfelter $49.82, P. H. Fennell $126.12, W. C. Fulton $1049.90, and D. L. Golden $—.

And it further appearing to the court that in said suit property belonging to the defendant Co. was attached for the purpose of satisfying such judgments as might be obtained by the several plaintiffs against the said defendant company.

129 It is therefore ordered that the sheriff of Ouray county proceed to sell the above-described property or so much

thereof as shall be necessary to satisfy said several judgments, together with the costs and interest thereon.

And it is further ordered that in case the sum realized from such sale shall not be sufficient to satisfy said several judgments, interest, and costs in full, that then the amount realized from said sale shall be appropriated as follows, to wit:—

First. To the payment of all costs connected with the said several suits and proceedings.

Second. The amount remaining to be prorated and paid to the said several judgment creditors in accordance with the amounts of the said several judgments entered herein, save and except as to the judgment obtained by D. L. Golden; and with respect to said judgment it appearing to the court that a telegram dated Denver, August 16, '95, was received by the above-named plaintiff and signed by the said Golden stating that his judgment had been settled; it is ordered by the court that the sale of said property and that this prorating order shall not extend to or include said judgment of the said D. L. Golden, but that the same shall stand in abeyance until the further order of this court in the premises.

Witness, Rob't H. Wilson, judge and clerk of said court, this — day of ——, 1895.

In the Ouray County Court, March Term, A. D. 1895.

No.	Parties.	Action.	Attorneys.
1437	The A. W. Begole Mercantile Co., a corporation, *vs.* The Cosmopolitan Mining Company, a corporation.	Attachment on account.	Emerson & Bradshaw.

Date.	Papers filed, &c.	Plaintiff's costs.			Memoranda.
		Clerk's.	Sheriff's.	Credits.	
April 26	To filing complaint & affidavit	37½		500	Judgment.
	To approving bond & filing	112½			
	To filing affidavit in attach	12½			
	To swearing to same	25			
	To issuing writ & copy	155			
	To appearance	25			
	To two dockets	40			
	To index	10			
	To fee bill	75			
" 29	To issuing summons & copy	100			
	To issuing attachment & copy	155	747½		
June 27	To hearing	4.			
	" default	60			
	" judgment	80			
	" swearing 1 witness	12½			
	" trans. on J. D.	60			
	" filing 7 papers to date	87½	1447½		
	By cash			947½	
July 23	To execution and præcipe	262			
"	By cash			262	
1900. Oct. 31st	Transcript	976½		976½	

(Fee Book "C," page 292.)

(Then follows the transcript of the judgment docket which has appeared hereinbefore as part of Exhibit 9.)

(All of which was duly certified by the clerk of the county court of Ouray county.)

The supplement in the record in Exhibit 11 (which supplement is now marked Exhibit 21, for convenience, although at the time of the trial it was not given a new number) consists of the following documents:

131 EXHIBIT 21.

STATE OF COLORADO, } ss:
County of Ouray, }

In the County Court.

P. H. FENNELL, Plaintiff,
vs.
COSMOPOLITAN MINING COMPANY, Defendant. } Complaint.

Plaintiff complains and alleges:

I. That the amount involved in this action and for which relief is sought does not exceed the sum of two thousand dollars.

II. That the defendant is a corporation duly incorporated and organized under and by virtue of the laws of the State of Maine, with its principal office in the State of Colorado at Ouray, in said Ouray county.

And for a first cause of action against the defendant the plaintiff alleges:

I. That on or about the 1st day of August, 1894, the defendant was indebted to the plaintiff for and upon an account for work and labor done and performed by said plaintiff for defendant, at defendant's special instance and request, between the 30th day of June, 1894, and the date last aforesaid, in the sum of $58.75.

II. That the said sum of $58.75 has not been paid nor any part thereof, and the same is now due and owing from defendant to plaintiff with interest thereon at the rate of 8 % per annum from the 1st day of August, 1894.

And for a second cause of action against the defendant plaintiff alleges:

I. That on or about the 1st day of August, 1894, defendant was indebted to one John Dowd in the sum of $58.75, for and upon an account for work and labor done and performed by the said
132 Dowd for defendant, at defendant's special instance and request, between the 30th day of June, 1894, and the date last aforesaid.

II. That on or about the 22nd day of May, 1895, the said Dowd assigned, transferred, and set over said account to this plaintiff for collection.

III. That the said sum of $58.75 has not been paid nor any part thereof, and the same is now due and owing to this plaintiff from defendant together with interest thereon at the rate of eight per cent. per annum from the 1st day of August, 1894.

IV. That on or about the 26th day of April, 1895, suit was commenced against the defendant herein by the A. W. Begole Mercantile Company in this court, wherein a writ of attachment was issued out of this court and a levy made thereunder by the sheriff of said Ouray county, attaching all of the real property of said defendant found in said county.

Wherefore plaintiff demands judgment against the defendant.

1. For the sum of $58.75, together with interest thereon at the rate of 8% per annum from the 1st day of August, 1894, as in the first cause of action herein set forth.

2. For the sum of $58.75, together with interest thereon at the rate of 8% per annum, as in the second cause of action herein set forth.

3. For costs of this action, and for general relief.

4. And plaintiff asks the court further that he be made a party plaintiff in the said suit hereinabove mentioned and be given like remedies against the defendant herein as the law gives to the original plaintiff in the said action.

(Signed) EMERSON & BRADSHAW,
Attorneys for Plaintiff.

(Which complaint was duly verified.)
(The foregoing document was duly endorsed.)

133 STATE OF COLORADO, } ss:
County of Ouray, }

In the County Court in and for the County of Ouray, in the State Aforesaid.

P. H. FENNELL, Plaintiff,
vs.
COSMOPOLITAN MINING COMPANY, a Corporation, Defendant. } Undertaking on Attachment.

Whereas, the above-named plaintiff has commenced or is about to commence an action in the county court in and for the county of Ouray, in the State aforesaid, against the above-named defendant upon a contract for the direct payment of money, claiming that there is due to the said plaintiff from the said defendant the sum of one hundred seventeen 50/100 dollars lawful money of the United States, besides interest, and said plaintiff is about to apply for an attachment against the property of the said defendant as security for the satisfaction of any judgment that may be recovered therein.

Now, therefore, we, the undersigned, residents of the county of Ouray, State of Colorado, in consideration of the premises, and of the issuing of said attachment, do jointly and severally undertake in the sum of two hundred fifty dollars and promise to the effect that if the said defendant recover judgment in said action, or if the said court shall finally decide that the said plaintiff was not entitled to an attachment, the said plaintiff will pay all costs that may be awarded to the said defendant and all damages which it may sustain by reason of the wrongful suing out of the said attachment, not exceeding the sum of two hundred fifty dollars.

Dated this 23rd day of May A. D. 1895.

(Signed) T. W. KNOWLES.
(") W. H. FOURRELL.

134 (On the back of the foregoing document was a form of jurat but not filled out. The document was duly endorsed.)

STATE OF COLORADO, } ss:
County of Ouray, }

In the County Court within and for the County of Ouray Aforesaid.

P. H. FENNELL, Plaintiff,
versus
COSMOPOLITAN MINING COMPANY, a Corporation, Defendant.

Thomas Y. Bradshaw of said county, being duly sworn, doth depose and say that he is one of plaintiff's attorneys in the above action; that the Cosmopolitan Mining Company, against whom the said P. H. Fennell is about to sue out an attachment, is indebted to him in a sum not exceeding twenty hundred dollars, to wit: the sum of one hundred seventeen and 50/100 dollars and interest; and that the said demand is now wholly due and unpaid and that the same is for and upon account of work and labor done and performed by plaintiff for defendant, at defendant's special instance and request, in the sum of 58.75, and for work and labor done and performed as aforesaid for defendant, at defendant's special instance and request, by one John Dowd in the sum of 58.75, and said last-named claim has been by said John Dowd assigned to plaintiff herein for collection, all of said work and labor being done and performed during the month of July, 1894; and which should have been paid for at the time of the completion of such work.

(Signed) THOMAS Y. BRADSHAW.

Sworn and subscribed to before me, this 23rd day of May, A. D. 1895.

ROB'T H. WILSON,
Judge and Clerk,
[SEAL.] By MARY F. WILSON, *Dep. Clerk.*

135 (The foregoing document was duly endorsed.)

STATE OF COLORADO, } ss:
County of Ouray, }

In the County Court.

P. H. FENNELL, Plaintiff,
vs.
COSMOPOLITAN MINING COMPANY, a Corporation, Defendant. } Summons.

The People of the State of Colorado to Cosmopolitan Mining Co., the defendant above named, Greeting:

You are hereby required to appear in an action brought against you by the above-named plaintiff in the county court, of Ouray county, State of Colorado, and answer the complaint therein within twenty days after the service hereof, if served within this county, or, if served out of this county, or by publication, within thirty days after the service hereof, exclusive of the day of service; or judgment

by default will be taken against you according to the prayer of the complaint. And if a copy of the complaint in the above-entitled action be not served with this summons, or if the service hereof be made out of this State, then ten days additional to the time hereinbefore specified for appearance and answer will be allowed before the taking of judgment by default as aforesaid.

The said action is brought to recover from the defendant the sum of $117.50, and interest thereon from the 1st day of August, 1894, at 8 % per annum, amount alleged to be due the plaintiff from the defendant to the plaintiff for and upon an account for work and labor done and performed by said plaintiff for defendant, at defendant's special instance and request, between the 1st day of June, 1894, and the 1st day of August, 1894, in the sum of $58.75; and also the sum of $58.75 due to one John Dowd for and upon an account for
136 work and labor done and performed as aforesaid between the dates aforesaid, and by the said John Dowd assigned to this plaintiff for collection, as will more fully appear from the complaint in said action to which reference is here made. *

And you are hereby notified that if you fail to appear, and to answer the said complaint as above required the said plaintiff will take judgment against you by default in accordance with the prayer of said complaint.

[SEAL.] Given under my hand and the seal of said court at Ouray in said county, this 23rd day of May, A. D. 1895.

ROBT H. WILSON,
Judge and Clerk,
By MARY F. WILSON,
Dep. Clerk.

(Index) *A copy of which is hereto attached.

STATE OF COLORADO, }
County of San Miguel, } ss:

I do hereby certify that I have duly served the within summons, together with a copy of the complaint in the within-stated action, on this 27th day of May, A. D. 1895, by personally delivering a true copy of said summons, together with a copy of the original complaint in the action therein mentioned, thereto attached, to J. M. Jardine, he being the duly authorized agent for the within-named defendant company.

J. C. RUTAN, *Sheriff.*

(The foregoing document was duly endorsed.)

STATE OF COLORADO, } ss:
Ouray County, }

In the County Court within and for the County of Ouray, in the State of Colorado.

137 P. H. FENNELL, Plaintiff,
vs.
COSMOPOLITAN MINING COMPANY, a Corporation, Defendant. } Writ of Attachment.

The People of the State of Colorado to the sheriff of the county of San Miguel, Greeting:

Whereas the above-entitled action was commenced in the county court in and for the said county of Ouray, in the State of Colorado, by the plaintiff in the said action to recover from the defendant Cosmopolitan Mining Co., in the said action, the sum of one hundred seventeen and 50/100 dollars, lawful money of the United States, besides interest at the rate of 8 per cent. per annum from the 1st day of August, A. D. 1894, and costs of suit; and the necessary affidavit and undertaking herein having been filed as required by law;

Now, we do therefore command you, the said sheriff that you serve a copy hereof on the above defendant, if it be found in your county, and also attach and safely keep all the property of said defendant within your said county not exempt from execution or so much thereof as may be sufficient to satisfy the said plaintiff's demand, as above, and in the affidavit herein mentioned, unless the said defendant deposit with you the amount or give you security by an undertaking of at least two sufficient sureties in an amount sufficient to satisfy such demand, besides costs, or in an amount equal to the value of the property which has been or is about to be attached; in which case you will take such undertaking and hereof make due and legal service and return.

Witness, Rob't H. Wilson, judge & clerk of said court, and the seal thereof, at Ouray aforesaid, his 23rd day of May, A. D. 1895.

(Signatures next page.)

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ROBT H. WILSON,
Judge and Clerk,
By MARY F. WILSON,
Deputy Clerk.

[SEAL.]

STATE OF COLORADO, } ss:
San Miguel County, }

I do hereby certify that I have duly executed the within writ on this 27th day of May, A. D. 1895, by delivering a true copy of same to J. M. Jardine, he being the duly authorized agent for the within-named defendant company.

J. C. RUTAN, *Sheriff.*

(The foregoing document was duly endorsed.)

STATE OF COLORADO, } ss:
County of Ouray, }

In the County Court within and for the County of Ouray, State of Colorado.

P. H. FENNELL, Plaintiff,
vs.
COSMOPOLITAN MINING COMPANY, a Corporation, Defendant. } Writ of Attachment.

The People of the State of Colorado to the sheriff of the said county of Ouray, Greeting:

Whereas, the above-entitled action was commenced in the county court in and for the said county of Ouray in the State of Colorado by the plaintiff in the said action to recover from the defendant, Cosmopolitan Mining Co. in the said action the sum of one hundred seventeen and 50/100 dollars, lawful money of the United States, besides interest at the rate of 8 per cent. per annum from the 1st day of August, A. D. 1894, and costs of suit; and the necessary affidavit and undertaking herein having been filed as required by law.

Now, we do therefore command you, the said sheriff, that
139 you serve a copy hereof on the above defendant, if it be found in your county, and also attach and safely keep all the property of said defendant within your said county, not exempt from execution or so much thereof as may be sufficient to satisfy the said plaintiff's demand, as above mentioned; unless the said defendant deposit with you an amount or give you security by an undertaking of at least two sufficient sureties in an amount sufficient to satisfy such demand, besides costs, or in an amount equal to the value of the property which has been, or is about to be attached; in which case you will take such undertaking, and hereof make due and legal service and return.

Witness Rob't H. Wilson, judge & clerk of said court, and the seal thereof at Ouray, this 23rd day of May, A. D. 1895.

ROBT H. WILSON,
Judge & Clerk,
By MARY F. WILSON,
Deputy Clerk.

[SEAL.]

STATE OF COLORADO, } ss:
Ouray County, }

I do hereby certify that I have duly executed the within writ on this 23rd day of May, A. D. 1895, by levying upon and attaching all the right, title, interest, claim, and demand, and equity of redemption of the Cosmopolitan Mining Company in and to the following-described real property to wit: The Yellow Rose lode; the Crusader lode; the Norma lode; the Talisman lode; the Hidden Treasure lode; the Gertrude lode, and the Emily Lode mining claims, situated

in Imogene basin, Mr. Sneffles mining district, county of
140 Ouray and State of Colorado; and also the mill sites and each and every of them in said basin, district, county and State, and to said lodes and each and every of them belonging, which said lodes and mill sites are more accurately described in detail and identified by metes and bounds in the books of record in and for the recorder's office of the said county of Ouray and the State of Colorado, to which records reference is hereby made.

And I further certify that I have further executed the within writ by delivering a true copy hereof to and filing the same with the clerk and recorder of said Ouray county.

MAURICE CORBETT, *Sheriff.*

(The foregoing document was duly endorsed.)

STATE OF COLORADO, } *ss:*
Ouray County, }

The People of the State of Colorado to the sheriff of Ouray county, Greeting:

Whereas, by virtue of a certain writ of attachment, issued out of our county court on the 23rd day of May, A. D. 1895, and that on the 23rd day of May, 1895, you levied upon the Yellow Rose lode, Crusader lode, Norma lode, Tailsman lode, Hidden Treasure lode, Gertrude lode, and the Emily lode, all situated in Imogene basin Mt. Sneffles mining district, county and State aforesaid all *all* mill sites thereunto belonging, more particularly described in the location certificates thereof on record with the clerk & recorder of said county & State as the property of the Cosmopolitan Mining Co., as appears by your certificate of levy, filed and recorded in this office; and whereas, afterward, to wit, on the 10th day of July, A. D. 1895, by the consideration of our county court, P. H. Fennell recovered judgment against the said The Cosmopolitan Mining Co. for the sum of one hundred and twenty-six and 12/100 dollars damages, and also the further sum of twenty-two 82/100 dollars costs of suit, as appears of record.

141 We therefore command you, that you immediately proceed to sell the property by you levied upon, as hereinbefore described, or so much thereof as is necessary to make the aforesaid sums of money, with interest on said judgment from the day of the rendition of the same; and have the said money ready, as soon as may be, to render unto the said court for adjustment among the several judgment creditors in proportion to the amount of their respective claims according to law.

Hereof fail not, and make return to this writ, with your doings endorsed thereon in ninety days from the date hereof.

Witness, Rob't H. Wilson, judge and clerk of our said county court, and the seal thereof, at Ouray this 23rd day of July, A. D. 1895.

ROBT H. WILSON,
[SEAL.] *Judge & Clerk.*

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STATE OF COLORADO, } ss:
Ouray County, }

I hereby return the within execution fully satisfied in accordance with my return made on the execution issued in the case of The A. W. Begole Mercantile Company *vs.* The Cosmopolitan Mining Company, this 30th day of September, 1895.

(Signed) MAURICE CORBETT, *Sheriff.*

(The foregoing document was duly endorsed.)

OURAY, COLO., *Aug.* 1*st*, 1894.

Due P. H. Fennell 23½ days' work in month of July at 2.50 per day fifty-eight 75/100.

$58.75. COSMOPOLITAN MINING CO.

(Signed) D. L. GOLDEN, *Supt.*

(Endorsed on the back as follows:—)

Filed July 10" 1895,

ROB'T H. WILSON,

142 *Judge & Clerk.*

OURAY, COLO., *Aug.* 1*st*, 1894.

Due John Dowd 23½ days in July at 2.50 per day fifty-eight 75/100.

$58.75. COSMOPOLITAN MINING CO.

(Signed) D. L. GOLDEN, *Supt.*

(Endorsed on the back as follows:)

DENVER, COLO., *May* 22, 1895.

For value received I hereby assign, transfer, and set over the within claim to P. H. Fennell for collection.

——— ———.

Filed July 10" 1895.

ROB'T H. WILSON,
Judge & Clerk.

STATE OF COLORADO, } ss:
Ouray County, }

In the County Court in and for said County.

P. H. FENNELL, Plaintiff, }
vs. } Præcipe for Execution.
COSMOPOLITAN M'N'G CO., Defendant. }

To Rob't H. Wilson, judge & clerk of said court:

You will please issue special execution in the above-entitled cause and this shall be your warrant therefor.

Dated this 23rd day of July, A. D. 1895.

(Signed) EMERSON & BRADSHAW,
Plaintiff's Attorney.

(The foregoing document was duly endorsed.)

143 (Then follow the default and judgment which have heretofore appeared in the record as part of Exhibit 11.)

In the County Court, —— Term, A. D. 18—.

No.	Parties.	Action.	Attorneys.
1440	P. H. Fennell *vs.* Cosmopolitan Mining Company, a corporation.	Attachment on account.	Emerson & Bradshaw.

Date.	Papers filed, &c.	Plaintiff's costs.			Memoranda.
		Clerk's.	Sheriff's.	Credits.	
May 23	To filing and approving bond	11.25			Judgment.
	" affidavit and filing	3.75			
	" issuing summons and copy	1.00			
	" issuing two attachment writs	2.50			
	" issuing two copies of same	.60			
	" index	.10			
	" fee bill	.75			
	" 2 dockets	.40			
	" appearance	.25			
May 24	" filing comp. & veri.	3.75			
" 29	By cash pr. Knowles			5.00	
" 31	To filing 2 papers	.25			
July 10	" " " "	.25			
	" hearing	.4			
	" default	.60			
	" judgment	.80			
	" swearing witness	1.25			
	" trans. on J. D.	.60	14.10		
July 23	" execution and præcipe	2.62			
	By cash pr. Knowles			9.10	
Aug. 13 1900.	" " " Fennel			2.60	
Oct. 31	Transcript	9.76½		9.76½	

(Then follows transcript of judgment docket, which has heretofore appeared in the record as a portion of Exhibit 11.)

(All of which was duly certified by the clerk of the county
144 court of Ouray county.)

The supplement in the record to Exhibit 12, which supplement is marked Exhibit 18, consists of the following documents:—

EXHIBIT 18.

STATE OF COLORADO, } ss:
County of Ouray, }

In the County Court.

WILLIAM C. FULTON, Pl'ff.
vs.
THE COSMOPOLITAN MINING COMPANY, a Corporation, Defendant. } Complaint.

Plaintiff complains and alleges:

1st. That the amount involved in this action does not exceed the sum of two thousand dollars.

2nd. That the defendant is a corporation duly organized under the laws of ——

III. That on the 4th day of November, 1893, at Ouray county aforesaid, the defendant was indebted to one John Lillar, in the sum of nine hundred twenty-two and 80/100 dollars, upon an account for work and labor performed in and about the working and development of the Hidden Treasure mine belonging to the defendant upon a contract express—that said work and labor and material was reasonably worth and the defendant agreed to pay for the same the said sum of $922.80.

IV. That prior to the beginning of this action the said claim and account was, for value, assigned to the plaintiff.

V. That the defendant has not paid the same nor any part thereof.

Wherefore, plaintiff prays judgment for the said sum of $922.80 with interest thereon from the said 4th day of November,
145 1893, and for costs of suit.

(Signed) STORY & STEVENS,
Att'ys for Plaintiff.

(The foregoing complaint was duly verified and endorsed.)

STATE OF COLORADO, } ss:
Ouray County, }

In the County Court in and for the County of Ouray, in the State Aforesaid.

WM. C. FULTON, Plaintiff,
vs.
THE COSMOPOLITAN MINING COMPANY, a Corporation, Defendant. } Undertaking on Attachment.

Whereas the above-named plaintiff has commenced, or is about to commence an action in the county court in and for the county of Ouray, in the State aforesaid, against the above-named defendant,

upon a contract for the direct payment of money, claiming that there is due to the said plaintiff from the said defendant the sum of nine hundred twenty-two and 80/100 dollars, lawful money of the United States, besides interest, and the plaintiff is about to apply for an attachment against the property of the said defendant as security for the satisfaction of any judgment that may be recovered therein.

Now, therefore, we, the undersigned, residents of the county of Ouray, State of Colorado, in consideration of the premises, and of the issuing of said attachment, do jointly and severally undertake in the sum of eighteen hundred and fifty dollars and promise to the effect, that if the said defendant shall recover judgment in said action, or if the said court shall finally decide that the said plaintiff was not entitled to an attachment, the said plaintiff will pay all costs that may be awarded to the said defendant company and all damages
146 which it may sustain by reason of the wrongful suing out of the said attachment, not exceeding the sum of eighteen hundred and fifty dollars.

Dated this 25th day of May A. D. 1895.

W. C. FULTON.
E. H. POWELL.
J. C. MARSH.

(On the back of the foregoing document was the oath as to the worth of the sureties, not filled out, but signed "E. H. Powell" and "J. C. Marsh." The document was also endorsed.)

STATE OF COLORADO, } *ss*:
County of Ouray, }

In the County Court within and for the County of Ouray Aforesaid, the — Term, A. D. 1895.

WILLIAM C. FULTON, Plaintiff,
versus
THE COSMOPOLITAN MINING COMPANY, a Corporation, Defendant.

William C. Fulton of said county, being duly sworn doth depose and say that the defendant The Cosmopolitan Mining Company, against whom the said William C. Fulton is about to sue out an attachment, is indebted to him in a sum not exceeding ten hundred dollars, to wit: the sum of nine hundred twenty-two and 80/100 dollars, and that the said demand is — and unpaid on an express contract, and that the said sum of $922.80 is due from defendant to plaintiff, for work and labor performed by John Lillar, for said defendant at its request; that the said claim was by the said John Lillar for value assigned to the plaintiff; that said sum is *do* on a written order of the agent of said corporation, for the direct and unconditional payment of money; that the defendant is a foreign corporation.

147 (Signed) W. C. FULTON.

Sworn and subscribed to before me, this 25th day of May, A. D. 1895.

ROB'T H. WILSON,
County Judge & Clerk Co. Come.

[SEAL.]

(The foregoing paper was duly endorsed.)

STATE OF COLORADO, } ss:
County of Ouray, }

In the County Court within and for the County of Ouray, State of Colorado.

WM. C. FULTON, Plaintiff,
vs.
THE COSMOPOLITAN MINING CO., a Corporation, Defendant. } Writ of Attachment.

The People of the State of Colorado to the sheriff of the said county of Ouray, Greeting:

Whereas the above-entitled action was commenced in the county court in and for the said county of Ouray, in the State of Colorado, by the plaintiff in the said action, to recover from the defendant, The Cosmopolitan Mining Co. a corporation, in the said action, the sum of nine hundred twenty-two and 80/100 dollars, lawful money of the United States, besides interest at the rate of — per cent. per — from the — day of ——, A. D. 189–, and costs of suit; and the necessary affidavit and undertaking herein having been filed as required by law.

Now, we do therefore command you, the said sheriff, that you serve a copy hereof on the above defendant, if *he* be found in your county, and also attach and safely keep all the property of said defendant, The Cosmopolitan Mining Co., a corporation, within your said county, not exempt from execution, or so much thereof as may be sufficient to satisfy the said plaintiff's demand, as above,
148 and in the affidavit herein mentioned, unless the said defendant deposit with you the amount or give you security by an undertaking of at least two sufficient sureties, in an amount sufficient to satisfy such demand, besides costs, or in an amount equal to the value of the property which has been or is about to be attached; in which case you will take such undertaking; and hereof make due and legal service and return.

Witness, Rob't H. Wilson, judge & clerk of said court, and the seal thereof, at Ouray, this 13th day of June, A. D. 1895.

ROB'T H. WILSON,
Judge & Clerk,
By MARY F. WILSON,
Deputy Clerk.

[SEAL.]

STATE OF COLORADO, } ss:
San Miguel County, }

I do hereby certify that I have duly executed the within writ on this 22nd day of June, A. D. 1895, by delivering to J. M. Jardine, a true copy of same, he being the duly authorized agent for the within-named defendant company.

J. C. RUTAN, *Sheriff.*

(The foregoing document was duly endorsed.)

STATE OF COLORADO, } ss:
County of Ouray, }

In the County Court.

WILLIAM C. FULTON, Plaintiff,
vs.
THE COSMOPOLITAN MINING COMPANY, a Corporation, Defendant. } Summons.

149 The People of the State of Colorado to The Cosmopolitan Mining Company, a corporation, the defendant above named, Greeting:

You are hereby required to appear in an action brought against you by the above-named plaintiff in the county court of Ouray county, State of Colorado, and answer the complaint therein within twenty days after the service hereof, if served within this county, or, if served out of this county, or by publication, within thirty days after the service hereof, exclusive of the day of service; or judgment by default will be taken against you according to the prayer of the complaint. And if a copy of the complaint in the above-entitled action be not served with this summons, or if the service hereof be made out of this State, then ten days additional to the time hereinbefore specified for appearance and answer will be allowed before the taking of judgment by default as aforesaid.

The said action is brought to recover from you the sum of $922.80 upon an account for work and labor performed by one John Lillar, at your request, and for which you agreed to pay said sum of $922.80 which said account has been for value, assigned to the plaintiff, as will more fully appear from the complaint in said action to which reference is here made, a copy of which is attached hereto.

And you are hereby notified that if you fail to appear and to answer the said complaint as above required, the said plaintiff will take default and judgment against you according to the prayer of the complaint.

Given under my hand and the seal of said court at Ouray in said county, this 13th day of June, A. D. 1895.

ROBT H. WILSON,
Judge and Clerk.

[SEAL.]

MARY F. WILSON,
Deputy Clerk.

STATE OF COLORADO, } ss:
County of San Miguel, }

I do hereby certify that I have duly served the within sum-
150 mons, together with a copy of the complaint in the within-stated action on this 22nd day of June, A. D. 1895, by personally delivering a true copy of said summons, together with a copy of the original complaint in the action therein mentioned, thereto attached, to the within-named defendant, J. M. Jardine he being the duly authorized agent for the within-named defendant company.

J. C. RUTAN, *Sheriff.*

(The foregoing document was duly endorsed.)

THE BEAUMONT, OURAY, COL., *Nov. 4th*, 1893.

On receipt by you pay to John Lillar or order, nine hundred and twenty-two 80/100 $922.80 to Dan L. Golden Ouray.

(Signed) JOHN M. S. EGAN.

Dan Golden please pay the above order of nine hundred & twenty-two & 80/100 dollars to W. C. Fulton and oblige,

(Signed) J. L. LILLAR.

(Endorsed on the back as follows:)

Filed July 26" 1895.

ROB'T H. WILSON,
Judge & Clerk.

(Then follow the default and judgment, which have appeared heretofore in this record as a portion of Exhibit 12.)

STATE OF COLORADO, } ss:
Ouray County, }

The People of the State of Colorado to the sheriff of Ouray county, Greeting:

We command you, that of the lands and tenements, goods and chattels, of The Cosmopolitan Mining Company, defendant, in your county, you cause to be made the sum of one thousand and forty-nine and 90/100 dollars, which W. C. Fulton plaintiff lately in the county court of said Ouray county, at a term thereof begun and
151 held at Ouray in said county, on the 26" day of July, A. D. 1895, recovered against the said defendant, and which by the said court was adjudged to the said plaintiff for his damages by him in his behalf sustained, together with interest upon said judgment from the date of the recovery thereof until the same is paid at the rate of 8 per cent. per annum. And also, the further sum of

fifteen dollars and forty cents, which were adjusted to the said plaintiff for his costs and charges in that behalf expended, whereof the said defendant is convicted, as appears to us of record. And have you these moneys ready to render to the said court for damages for adjustment among the several judgment creditors in proportion to the amount of their respective claims, and costs aforesaid, and make return of this writ, with an indorsement there- in what manner you shall have executed the same, within ninety days from the date hereof.

Witness, Rob't H. Wilson, judge and clerk of said court, and the seal thereof, at Ouray, in said county, this 27 day of July, A. D. 1895.

ROB'T H. WILSON,
Judge & Clerk.

STATE OF COLORADO, } ss:
Ouray County, }

I hereby return the within execution fully satisfied in accordance with my return made on the execution issued in the case of The A. W. Begole Mercantile Company *vs.* The Cosmopolitan Mining Company, this 30th day of September, 1895.

(Signed) MAURICE CORBETT, *Sheriff.*

(The foregoing document was duly endorsed.)

In the Ouray County Court, May Term, A. D. 1895.

No.	Parties.	Action.	Attorneys.
1443	William C. Fulton *vs.* The Cosmopolitan Mining Company.	Attachment on account.	Story & Stevens.

152

Date.	Papers filed, etc.	Plaintiff's costs.			Memoranda.
		Clerk's.	Sheriff's.	Credits.	
1895.					
May 25	To complaint and aff.	37½	.....	.....	Judgment.
	" aff. in attachment	37½			
	" filing & approving bond	112½			
	" appearance of att'y.	25			
	" 2 dockets	40			
	" index	10			
	" fee bill	75			
	By cash pl'ff	.....	.....	500	
June 13	To summons and copy	100			
	" 1 attachment writ	125			
	" 2 copies	60			
July 18	" filing 2 papers	25			
	" " 1 papers	12½			
	" hearing	400			
	" judgment	80			
	" swearing witness	15			
	" making trans. in J. D.	60			
	" default	60			
	" execution & return	250			
	" precipe	12½	1537½		
	By cash to bal.	.....	.....	1040	
1900.					
Oct. 31st	Transcript	976¼	....	976¼	

(Fee Book "C," page 298.)

(Then follows transcript of judgment docket, which has appeared before herein as part of Exhibit 12.)

(All of which was duly certified by the clerk of the county court of Ouray county.)

Mr. PRESTON: Do I understand you to introduce all of these records, everything that is in them?

Mr. HUGHES: All except the affidavit in the Begole case (Plaintiff's Exhibit R).

Mr. PRESTON: To the introduction of each and all of these records we desire to interpose the same objections which were offered to the

introduction of the defaults and judgments in these cases, and
153 the additional objection that the summons and return in each case shows that each and all were served in the county of San Miguel, Colorado, and not in the county of Ouray, Colorado.

The COURT: The objection will be sustained to the offer of the pleadings and judgment in the case of William C. Fulton *v.* Cosmopolitan Mining Company (Defendant's Exhibits 12 and 18). In that case, it simply appears that the defendant is a corporation duly organized under the laws of —. It appears in this case the defendant is a non-resident corporation and there is nothing in the record tending to show that the defendant was doing business in this State.

To which ruling of the court counsel for defendant then and there duly excepted.

The COURT: In the other cases in each of the complaints is the averment that the corporation is a corporation duly incorporated and organized under and by virtue of the laws of the State of Maine; that its principal office in the State of Colorado is at Ouray in said Ouray county. I take it that the maintaining of a principal office there is the being found within the State. The objection will be overruled as to all except the Fulton case.

To which ruling of the court counsel for plaintiff then and there duly excepted.

154 Thereupon, the defendant, to further maintain the issues on his part, offered the following oral testimony:

DAVID R. REED, a witness produced on behalf of the defendant, being duly sworn, in answer to interrogatories propounded to him, testified as follows:

Direct examination by Mr. THOMAS:

Q. Mr. Reed, where do you reside?

A. In Ouray, Colorado.

Q. What is your profession or business?

A. Mining engineer.

Q. Do you know the defendant in this case, Mr. Walsh?

A. I do.

Q. State whether or not you have been in his employ during recent years?

A. I have.

Q. In what capacity?

A. Engineer.

Q. About how long have you acted as engineer for the defendant?

A. Continuously for about five years.

Q. Are you familiar with a group or series of mining claims and mill sites known generally as the Cosmopolitan group?

A. I am.

Q. How long have you known of the claims that are supposed to constitute that group?

A. About twenty-two years.

Q. Have you made a plat recently of the claims that are in controversy here, being the claims of the Cosmopolitan group?

A. I have.

Q. Showing their relations to each other and to other properties?

155 A. Yes, sir.

Q. I show you Defendant's Exhibit 14, and ask you to state what it is and who prepared it.

A. A map showing the location of various claims in Imogene basin, Mt. Sneffles mining district, Ouray county, showing among other things the location of the claims formerly owned by the Cosmopolitan Mining Company. Those claims appear in colors.

Q. What color?

A. Yellow.

Q. Showing their relations to each other?

A. And to the surrounding claims.

Q. These claims bear their appropriate names in their appropriate places, I suppose?

A. They do.

Q. What have you had to do with those claims or any of them since the summer of 1896, Mr. Reed?

A. In what way?

Q. In any way.

A. Well, I have been engaged in surveying claims in that vicinity and various other surveys on the ground and on various claims as shown on the map (Exhibit 14).

Q. State, if you know, in whose possession these claims have been since the summer of 1896?

A. In the possession of Thomas F. Walsh.

Q. Do you know what, if any, work has been done upon these claims or any of them during that time?

156 To which question counsel for plaintiff objected on the ground that it was incompetent, immaterial and irrelevant, and not pertinent to any issue in this case.

Thereupon the court suggested that counsel for defendant, having the witness on the stand, might offer to prove just what said witness will testify to and the matter might come up on the objection to that offer.

Mr. THOMAS: We offer to prove that the defendant in reliance upon the regularity of the judgments heretofore offered in evidence and upon the execution, levy, sale, and conveyance of the property in controversy, and in reliance upon the validity of all the steps necessary for the maintenance of the defendant's title immediately after and continuously since the 16th day of June, 1896—that being the date of this conveyance—entered upon the possession of said premises and began working and developing the same, and has expended thereon large sums of money for the purpose of improving the said property and rendering it valuable as a mining claim, all of which was done with the knowledge, consent, and acquiescence of the plaintiff—I should say here that we expect to prove the consent,

if the court please, by the fact that no step was taken, no notice given, no demand made, and no protest of any sort made against the defendant, but that his possession and improvement of the property from the date mentioned was at all times open and notorious and that in and about the improvement of the property and
157 the development thereof the defendant has, since the 16th day of June, 1896, and prior to the filing of his answer, expended upon said premises for the purpose of improving and developing and making the same valuable, the sum of $128,500, or thereabouts. We further propose to show that it is these expenditures by the defendant which have given to the property in controversy whatever of value it may have at the present time or at the time of the commencement of the suit, and that without such expenditures and development the same would be worthless and of no value. We also expect to show that for the years 1889, 1890, 1891, 1892, 1893, 1894, and 1895, the defendant paid all of the taxes which had heretofore been levied and were due upon the property in question from the plaintiff, both State, county, and local, and also that he has paid the taxes thereon from the said year 1895, continuously down to the present time, and that no offer, demand, or request has been made at any time by the plaintiff to repay these taxes or to pay them to the authorities. This offer is made under the third defense of the defendant. We also propose to show that the work and the improvements mentioned consist both of underground and surface improvements upon the property.

To which offer, counsel for plaintiff objected on the ground
158 that it was incompetent, irrelevant, and immaterial, and not an issue in the case; also as not presenting the elements of estoppel and not being admissible under any other theory.

The COURT: Now do I understand that the consent of the plaintiff is simply to be a matter of inference from the other facts offered to be proved?

Mr. THOMAS: Oh, yes, the offer includes the fact that this work and development was open and notorious and that during that period of time the defendant made no protest or objection and that it had knowledge of our being in possession and working under this judgment and sale.

The COURT: Another element of the offer, I would like to understand also. It is that the plaintiff knew that the defendant believed his title was good under the judgment and sale; is it meant to actually introduce evidence on that fact other than is to be inferred from the notoriety of the possession and the improvements made?

Mr. THOMAS: No, I think not.

Mr. HUGHES: And the personal knowledge that the work was going on——

The COURT: But it is to be inferred from the other facts?

Mr. HUGHES—standing by quietly, saying nothing while the work was going on and the title claimed under these judgments.

159 Thereupon the court sustained the objections.

To which ruling of the court counsel for defendant then and there duly excepted.

Q. I show you Defendant's Exhibit 15, Mr. Reed, and ask you what that represents and who made it?

A. That is a chart made by me representing the Norma mill site, showing the location of one of the buildings erected by Mr. Walsh on that claim.

Q. That being one of the properties of the Cosmopolitan group?

A. It is.

Q. I now show you Defendant's Exhibit 16 and ask what that represents.

A. This is a plat made by me showing the location of the Emily and Gertrude mill sites and the locations of the surface improvements thereon—on the Emily mill site.

Q. I will now show you Defendant's Exhibit 17 and ask you to state what that is.

A. This is a plat of the Gertrude Lode claim showing both surface and underground improvements, the survey being made by me.

Q. Are the various delineations on those four exhibits correct? Made from actual surveys?

A. Made from actual surveys by me.

Thereupon counsel for defendant offered in evidence Exhibits 14, 15, 16, and 17.

To which offer counsel for plaintiff objected on same ground.

160 Which objection the court sustained.

To which ruling of the court counsel for defendant then and there duly excepted.

Cross-examination by Mr. PRESTON:

The COURT: What evidence has come from this witness that has not been excluded?

Mr. PRESTON: That Mr. Walsh has been in possession of these claims since the summer of 1896.

The COURT: You may cross-examine on that.

Q. You say Mr. Walsh has been in possession of these claims since 1896?

A. The summer——

Q. The summer of 1896?

A. Late in the fall of 1896.

Q. About what time—identify it as nearly as possible, will you please, Mr. Reed?

A. I could not say whether it was as early as September or as late as October.

Q. About that time?

A. Yes, sir.

Q. Were you there when he first went into possession?

A. I was in the basin more or less, yes, sir.

Q. Well, what was the condition of affairs there when he entered into possession in the fall of 1896, as to what was being done with the claims at the time he entered?

A. I would like to qualify that statement. It was earlier
161 than that; it was in the summer of 1896, it was earlier than September as I now recall it that Mr. Walsh first went in the basin and went on these claims.

Q. How did he go on these claims?

A. He was working upon the claims.

Q. Mining, employing men and all that?

A. Working upon the claims.

Q. How do you know that fact?

A. I saw them.

Q. Was there any one else working there besides the men Mr. Walsh employed?

A. I think not.

Q. Are you sure not?

A. I do not know that they were not.

Q. Well, you were in a position to know if there were other people working there, were you not?

A. You mean on these claims?

Q. Yes, sir.

A. No one that I know of.

Q. No one that you know of. Did you ever know since that time, since the early summer of 1896, of any one working on those claims other than Mr. Walsh's men?

A. I do not know of any others.

Mr. THOMAS: We have a number of other witnesses, if the court please, but the offer includes them as well. Under the ruling of the court we rest; we have no other testimony.

162 *Plaintiff's Rebuttal Testimony.*

Thereupon the plaintiff to further maintain the issues on its part, offered the following evidence in rebuttal.

EXHIBIT R.

STATE OF COLORADO, } ss:
County of Ouray, }

In the County Court Thereof.

THE A. W. BEGOLE MERCANTILE CO., Plaintiff, }
vs. } Motion.
THE COSMOPOLITAN MINING CO., Defendant. }

Come now J. M. Jardine, upon whom papers purporting to be a summons and writ of attachment in the above-entitled cause were served on May 8th, 1895, and respectfully represents to the court:

1st. That he is not, and has not been for several years past, a resident of Ouray county in said State, and therefore could not be an agent of defendant company in accordance with the general laws of this State under the facts alleged in the complaint herein.

2nd. That he has not for years acted as agent of said company defendant, does not consider himself or hold himself out to be such agent and refuses to accept service or do any other act on behalf of said defendant.

Wherefore he moves the court to quash the service of said summons and writ and hold the same for naught.

(Signed) J. M. JARDINE.

163 STATE OF COLORADO, } ss:
San Miguel County, }

Subscribed and sworn to before me this 18th day of May 1895. My commission expires May 16th, 1899.

STEPHEN A. BAILEY,
Notary Public.

(Endorsed on the back as follows:)

STATE OF COLORADO, }
Ouray County. }

In the County Court.

THE A. W. BEGOLE MERC. CO. }
vs. }
THE COSMOPOLITAN MNG. CO. }

Notice to the court that party purporting to have been served was not an agent of def't.

Filed May 27th, 1895.

ROBT H. WILSON,
Judge and Clerk.

Mr. THOMAS: Exhibit R is objected to, if the court please, because it is no way of proving the non-agency of the personal representative, because it is not notice to anybody except possibly the plaintiff in that case (referring to case of which Exhibit R is a portion) of anything that contains; it does not purport to be a statement of facts but of the affiant's understanding of his position; the evidence is incompetent for the purpose of showing that he was not an agent, he having once been appointed and never having been removed in the only way in which, under the statute he could be removed so
164 as to give notice to third persons; because it is incompetent, irrelevant, and a self-serving declaration it is the declaration of the agent furnished for that purpose. We object on the further ground that this is an attempt to collaterally attack the judgment and also to disprove by extraneous evidence the return of the sheriff.

Which objections the court sustained.

To which ruling of the court counsel for defendant then and there duly excepted.

The COURT: The objection is sustained with the qualification that if you prove the fact and it becomes important to determine whether

some one had notice of that fact, and prove that that person examined and knew the contents of the papers, why, you may introduce it in connection with that.

Thereupon counsel for plaintiff, to further maintain the issues on its part, offered the following oral testimony in rebuttal.

WILLIAM STORY, a witness produced on behalf of the plaintiff being duly sworn, in answer to interrogatories propounded to him, testified as follows:

165 Direct examination by Mr. PRESTON:

Q. Will you state your name, residence, and occupation?

A. William Story; Ouray; attorney-at-law.

Q. Were you one of the counsel for Mr. Thomas F. Walsh in a suit to quiet title brought in the county of Ouray in 1897?

A. I think so—if you will let me see the papers.

Q. The same action referred to as Defendant's Exhibit 13 (shows witness paper)?

A. Yes, sir, I was.

Q. The bill was filed in February, 1897, and the summons was served March 1, 1897, in Ouray county, Colorado, upon J. M. Jardine. Did you file that bill and did you direct upon whom that summons—the sheriff to serve that summons upon Mr. Jardine?

A. I think I did; that is my recollection.

Q. In that bill you state that the defendant—that is, The Cosmopolitan Mining Company—was a corporation organized under the laws of the State of Maine for the purpose, amongst others, of carrying on a mining business in the county of Ouray and State of Colorado, and by certificate dated December 16, 1885, recorded in Book C 1, page 291, on January 21, 1886, the said J. M. Jardine afterwards was, as required by the laws of the State of Colorado, duly appointed as the authorized agent of the defendant company upon whom process might be served. Now, will you please state, at that

166 time whether there were any other agents of the Cosmopolitan Mining Company in the county of Ouray, than John M. Jardine?

To which question counsel for defendant objected on the ground that it is incompetent, immaterial, and irrelevant and does not tend to prove any of the issues in this case.

The COURT: That record was admitted on the theory at least that the corporation consented to be served by serving the particular agent. The other records were admitted on the theory that it sufficiently appeared in the complaints that the corporation was doing business in Colorado. The court admitted that record at once and the others were excluded until the complaints were offered.

Mr. PRESTON: Does your honor exclude this offer?

The COURT: Yes, if I understand that you are trying to prove by this witness that the corporation was not doing business in the State except having a statutory agency.

Mr. PRESTON: Yes.

To which ruling of the court counsel for plaintiff then and there duly excepted.

167 Mr. PRESTON: I offer to prove by this witness that the corporation at the time of the service of summons in this case had no visible office in Ouray county, Colorado; that it had no agents upon whom process could be served, and that it was not engaged in the manual carrying on of the mining business at that time.

The COURT: Your offer is to prove that it had no agent on whom process might be served?

Mr. PRESTON: Well, I do not make it that broad—any other agent than John M. Jardine, the alleged statutory agent.

Mr. HUGHES: Then it is immaterial on the ground that you have offered only to show that there was no other person except Mr. Jardine upon whom process might be served.

Mr. PRESTON: I offer to prove by him that there was no office of any kind of the Cosmopolitan Mining Company in the city of Ouray, at that time, and no agent of any kind except John M. Jardine.

Mr. THOMAS: We object because incompetent and immaterial and because that one agent, Mr. Jardine, the statutory agent, is sufficient.

Which objections the court sustained.

Mr. PRESTON: I withdraw the offer.

168 I offer to prove in lieu of that offer that the Cosmopolitan Mining Company had no office and was not doing business in the county of Ouray at the time of the service of process in the bill to quiet title introduced in evidence, and I make the same offer to prove by this witness that the Cosmopolitan Mining Company had no office and was not doing business in the county of Ouray, at the time service of process was made in the case of William C. Fulton against the Cosmopolitan Mining Company, John Ashenfelter against the Cosmopolitan Mining Company and A. W. Begole Mercantile Company against the Cosmopolitan Mining Company.

Mr. HUGHES: I think, your honor, that is not one of the issues in this case. That is excluded.

Which objection the court overruled.

Mr. THOMAS: Well, if the court please, we were going to show that that offer was much broader than the question to which we objected. We desire to offer this objection to the offer that it may go in the record among other things that this is an attempt to

169 dispute the title of this judgment record by parol testimony, and this is not the proper way to prove things to which the question or the offer relates—that they had no statutory or other agent authorized to receive process.

Which objection the court overruled.

Mr. PRESTON: Do I understand that that ruling applies to the bill to quiet title as well as to the other?

The COURT: It applies to your last offer, and in that offer you embrace matters that I think are pertinent and I cannot exclude the offer as a whole.

Mr. THOMAS: Well, just what part of it does your honor hold good?

The COURT: I do not care to segregate the ruling as to the offer. If I sustain an objection to the offer then if any part of the
170 offer is pertinent testimony, it is error.

To which ruling of the court in overruling the above objections counsel for defendant then and there duly excepted.

Q. Governor, at the time of the service of the process in the suit to quiet title, did the Cosmopolitan Mining Company have any office in the county of Ouray, that you know of?

To which question counsel for defendant objected.

Which objection the court sustained.

To which ruling of the court counsel for plaintiff then and there duly excepted.

Q. Governor, at the time of the service of process—well, I will specify—in April, May, and June, 1895, did the Cosmopolitan Mining Company have any office in the county of Ouray, Colorado?

To which question counsel for defendant objected.

Which objection the court overruled.

To which ruling of the court counsel for defendant then and there duly excepted.

The COURT: I understand these dates refer to the other suits.

Mr. PRESTON: They are purely of the other suits.

A. Will you give me the dates again?

Q. April, May, and June.

A. 1895?

Q. 1895. Those are the months when the process was
171 served in those several attachment suits.

A. Well, I don't know that I can answer that for the reason that at certain seasons of the year I was away from Ouray, and, so far as I know, from the time the Cosmopolitan Mining Company filed its record in the office of the clerk and recorder of Ouray county of the appointment of J. M. Jardine there was no change, visible change, in it that I could see as to their method of doing business.

Q. Well, now, at the time of the appointment of J. M. Jardine what kind of an office did they have?

A. I never knew them to have any office except Mr. Jardine was the agent and that as such agent he was there as their representative, as I understood it, but I never saw an office in Ouray any time. At the time they made the appointment, my recollection at the present time is that was known as the office of the Cosmopolitan Mining Company.

Q. In April, May, and June, 1895 you were president of a bank in Telluride, were you not?

A. I was the president of the First national bank for some years; I will not say just when I parted with the majority of the stock, I

cannot say now positively, but I think I held that office during the year 1895.

Q. Where did John M. Jardine live during those months of 1895?

Thereupon counsel for defendant objected to said question as immaterial and irrelevant.

Which objection the court overruled.

172 To which ruling of the court counsel for defendant then and there duly excepted.

A. J. M. Jardine was at Telluride, I think, during those months.

Q. Governor, Mr. Jardine was in the First national bank there for some years was he not?

Thereupon counsel for defendant objected to said question as immaterial and irrelevant.

Which objection the court overruled.

To which ruling of the court counsel for defendant then and there duly excepted.

A. Yes, without refreshing my memory I could not give you the dates though.

Q. Well, have you anything by which you could refresh your memory?

A. I do not think I have with me. I probably could refresh my memory by taking time.

Q. Can't you remember when Mr. Jardine first became connected with your bank?

To which question counsel for defendant objected on the ground of being immaterial and irrelevant.

Which objection the court overruled.

To which ruling of the court counsel for defendant then and there duly excepted.

173 A. My impression is that Mr. Jardine in 1895, was connected with the bank during those months.

Q. Did you bring the action of William C. Fulton against the Cosmopolitan Mining Company?

A. Well, the firm did—it may have been done——

Q. I will ask you to look at the record.

To which question counsel for defendant objected on the ground that it is immaterial and has reference to a record that is excluded.

The COURT: What is the purpose?

Mr. PRESTON: This is to refresh his memory as to where Mr. Jardine lived in 1895.

The COURT: You may use it for that purpose.

A. I drew none of those papers and had nothing to do with them.

Q. Now, can't you state as a matter of fact, one way or the other, was or was not John M. Jardine a resident of Telluride in April, May, and June, 1895?

To which question counsel for defendant objected as being immaterial and irrelevant.

Which objection the court overruled.

To which ruling of the court counsel for defendant then and there duly excepted.

A. He was in the bank at that time.

174 Q. In what bank?

A. The First national.

Q. Where?

A. At Telluride.

Q. In what capacity?

A. He was there acting as book-keeper.

Q. How long had he been there at that time approximately?

To which question counsel for defendant objected as immaterial. Which objection the court overruled.

To which ruling of the court counsel for defendant then and there duly excepted.

A. Mr. Preston, I cannot answer that with any certainty at all.

Q. Well, had he or had he not been there for some time at that time in 1895?

A. My recollection is that he had been there for some months at that time. Now, just how long I could not state.

Q. Did you ever go to his house at Telluride?

A. Yes, sir.

Q. He had his family there?

A. His family was there at the time I went to his house.

Q. Can you tell about when that was?

A. No, I cannot answer whether that was before or after the time you speak of.

Q. Well, it was about then, was it not?

A. My impression is that the time I went to Mr. Jardine's house was later.

Q. You live in Ouray?

A. Yes, sir.

Q. Do you know when J. M. Jardine lived in Ouray?

To which question counsel for defendant objected as incompetent, immaterial, and irrelevant.

175 Which objection the court overruled.

To which ruling of the court counsel for defendant then and there duly excepted.

A. Well, Mr. Jardine would go away from Ouray and would return to Ouray and I cannot state definitely as to when he went away nor the different times when he returned.

Q. Well, now, assuming that he went away and that he took up a residence at Telluride at the same time, which you cannot tell exactly, after the taking up of that residence, did he ever return to live in Ouray?

To which question counsel for defendant objected as incompetent, immaterial, and irrelevant.

Which objection the court overruled.

To which ruling of the court counsel for defendant then and there duly excepted.

A. The question is as to whether he returned to Ouray after he worked——

Q. After he worked in the bank?

A. (Continuing:)—worked in the bank there. My impression is that he did not, but he was back and forth quite often and that leaves me in some doubt. My impression is that he did not take up a residence with his family.

Q. Well, he was the book-keeper there all the time he was
176 there, was he not?

A. Book-keeper and assistant cashier.

Q. And he remained there for some years?

A. He did.

Q. And he had to be at his place of business every day, didn't he practically?

A. Practically, he was there very largely at his place of business so far as I know.

Q. And how far is it according to the traveled route from Ouray to Telluride—I do not mean through tunnels?

A. It is called about fourteen miles by trail and fifty-five miles by railroad.

Q. Was he a married man?

A. Yes, I understood so.

Q. Have children?

A. He had a wife and children.

Q. And they were in Telluride at the same time, were they not?

A. They were there part of the time; part of the time they were not.

Cross-examination by Mr. THOMAS:

Q. How far were the mines, Mr. Story, from the town of Ouray?

A. Which mines do you speak of?

Q. The mines that are in controversy here and that once belonged to the Cosmopolitan Mining Company. Take the Hidden Treasure for example; that was the principal mine, was it not, at that time?

A. Well, I don't know, Governor Thomas, which was the principal mine. The mines as I understand them are up there at
177 Imogene basin and near where the Camp Bird workings were. Assuming that to be correct, I think about nine miles from Ouray and about six miles from Telluride.

Q. How far from Telluride?

A. About six or seven miles.

MAURICE CORBETT, a witness produced on behalf of the plaintiff, being duly sworn, in answer to interrogatories propounded to him, testified as follows:

Direct examination by Mr. PRESTON:

Q. State your name and residence.
A. Maurice Corbett; Ouray, Colorado.
Q. Were you ever sheriff of that county?
A. Yes, sir.
Q. Were you sheriff of that county in the year of 1895?
A. Yes, sir.
Q. I hand you a certified copy of a return purporting to be signed by you in the case of A. W. Begole Mercantile *Mercantile* Company against the Cosmopolitan Mining Company (Defendant's Exhibit 19) and ask you if you served and returned such a return in that case?

To which question counsel for defendant objected as the return indicates verity and it is evidently a condition of the return.
178 Which objection the court overruled.
To which ruling of the court counsel for defendant then and there duly excepted.

A. Yes, I think I served such a writ as that.
Q. In that return you state that you have been unable to make service of the within writ on the within-named defendant?
A. Yes, sir.
Q. There being no person within Ouray county upon whom process might be served?
A. Yes, sir.
Q. What search did you make for any one in that county upon whom process might be served?

To which question counsel for defendant objected.
Which objection the court overruled.
To which ruling of the court counsel for defendant then and there duly excepted.

A. I was informed that the agent called for was at Telluride at that time and was not in my county.
Q. Was there any one there that you knew of?
A. No one that I knew of.
Q. Was there any office there that you know of?
A. No, sir; they never had an office that I know of.

To all of which questions counsel for defendant objected saying "all of these questions."
179 Which objection the court overruled.
To which ruling of the court counsel for defendant then and there duly excepted.

Q. How long have you resided in that county?
A. About eighteen years.

Q. Did you go up to the mine?
A. I have been at the mine but was not at that time.
Q. Well, had you been at the mine about that time?
A. I was there later afterwards, but not at that time I wasn't there.
Q. Later, you say?
A. Yes; it was later.
Q. How much later?
A. I cannot just exactly state the time, but it was some time before the sale took place—of the property.
Q. Do you know if there were any persons working there at that time?
A. There were none.
Q. For how long before that had there been any persons working there that you know of?
A. Well, I don't know.
Q. Some time was it not?
A. Some time; yes, sir.

Mr. HUGHES: We object to that, your honor, if the witness says he don't know, for counsel to say "some time."
Mr. PRESTON: Well probably you are right, Mr. Hughes.

Q. Do you know who the last person was that had been
180 working at that mine?
A. No, sir; I do not.
Q. Don't you know who their last foreman was?
A. Mr. Golden was the last foreman I knew of.
Q. Was he there at that time?
A. When I was up there?
Q. Yes.
A. No, sir.
Q. Was he there at the time you served this process?
A. No, sir.
Q. How large a place was Ouray in 1895?

To which question counsel for defendant objected as incompetent, immaterial, and irrelevant.
Which objection the court overruled.
To which ruling of the court counsel for defendant then and there duly excepted.

A. Well, really I cannot say what the population of Ouray was at that time; if I knew at that time I have forgotten.
Q. Well, about how large—you know approximately?
A. I think in 1895 the county counted somewhere about 1800 votes; any closer than that I cannot tell you, and what the population of the town was I have no idea about that now.
Q. Was it a place of 5,000 people at that time?
A. No, sir; I do not think it was.
Q. You don't think it was?
A. No.
Q. About 3,500?

A. I think that would be about as near as I could guess it.

181 Q. About 3,500 people?

A. It might not be quite that much.

Q. When you went there were there any other people there at the mine other than you and your party?

A. There was no one at the Hidden Treasure.

Q. At the Hidden Treasure or any of those claims?

A. There was no one there at that time—that is around the property—that I knew.

Q. "That you knew"—what do you mean by that?

A. That is, to meet any one there that I knew.

Q. You didn't see any one there?

A. No; I met other parties on the road, but whether they were connected with the workings there I don't know.

Cross-examination by Mr. THOMAS:

Q. You say the last person in charge of the property was named Golden?

A. Yes, sir; that is, that I knew of.

Q. That you knew of?

A. Yes, sir.

Q. When was that?

A. That was some time previous to the beginning of these suits.

Q. About how long?

A. Well, Mr. Golden left some time in the fall and this was the next summer that I went up there.

Q. What is the condition of the country there in the winter time as to the ability to get to the mine?

182 A. Well, I think it is very bad.

Q. On account of what?

A. Oh, I never attempted to go there in the winter time.

Q. On account of what?

A. Snow.

Q. Snow?

A. Yes, sir.

Q. What time in 1895 or along there—what time of the year were these claims generally inaccessible?

A. Inaccessible?

Q. Yes, or unworkable on account of snow.

A. If there is a crew of men there they keep the trail open.

183 Q. Well, in this year, 1895, was there a crew of men up there anywhere to keep the trail open?

A. Well, when I was there it was in the summer season.

Q. In the winter of 1895?

A. If there was any one there I do not know.

Q. About what time did Mr. Golden leave?

A. I cannot exactly say; I remember seeing him leave there but just what time he left I cannot say.

Q. Now, during the times, Mr. Corbett, that these mines were being worked was there any office of the company downtown, down in Ouray, that you know anything about?

A. No, sir.

Q. So that there was just as much of an office there in June, 1895,—May and June, 1895,—as any time before?

A. Yes, as far as I know there was.

183 Q. Did you know Mr. Golden?

A. Yes, sir.

Q. There were a number of creditors of the company in and around Ouray, were there not, after Mr. Golden left?

To which question counsel for plaintiff objected as incompetent, immaterial, irrelevant, and improper cross-examination.

Which objection the court sustained.

To which ruling of the court counsel for defendant then and there duly excepted.

Q. I will put the question in another form and do not answer it until counsel can object. Do you know of any unsettled claims or accounts which were left unsettled by the company after Mr. Golden's departure in the fall of 1894?

To which question counsel for plaintiff objected as incompetent, immaterial, irrelevant, improper cross-examination and calling for a purely legal conclusion from the witness.

Which objection the court sustained.

To which ruling of the court counsel for defendant then and there duly excepted.

Q. Mr. Corbett, I show you what purports to be a transcript of the record of the case of Daniel L. Golden against the Cosmopolitan Mining Company to recover the sum of $1,189.60 for a bal-

184 ance due for work from him, and show you the writ of attachment or a certified copy of the writ of attachment, which you served in that case. I will ask you if you served the writ in that case?

To which question counsel for plaintiff objected as incompetent, immaterial, irrelevant, and improper cross-examination.

Which objection the court overruled.

To which ruling of the court counsel for plaintiff then and there duly excepted.

A. Yes; I made such a levy.

Q. You made that levy?

A. Yes, sir.

Q. You made the levy in the case to which Mr. Preston called your attention?

To which question counsel for plaintiff objected as incompetent, immaterial, irrelevant, and improper cross-examination, and also that the levy will show for itself.

Which objection the court sustained.

To which ruling of the court counsel for defendant then and there duly excepted.

Q. How long had you lived, Mr. Corbett, in Ouray county prior to the time when these attachment suits were brought?

A. About twelve years.

185 Q. About twelve years?

A. Yes, sir; eleven or twelve years.

Q. Eleven or twelve years?

A. I have been there about eighteen years.

Q. Do you know anything about how extensively the mines of the Cosmopolitan Mining Company were worked or developed during that time?

A. No, sir; I do not.

Q. You have no information in regard to that one way or the other?

A. No, sir; I have not.

Q. You do not know who was at work on the mine, nor when they were at work on the mine, do you?

A. No, sir; if I did I have forgotten who they were.

Q. So far as you personally know, there might have been men at work upon that mine, upon those mines, or some of them—after Mr. Golden left, might there not?

A. There might have been.

Q. As to that you have no knowledge one way or the other?

A. No, sir; I have no knowledge one way or the other.

And the above and foregoing was all the evidence offered or received at the trial of said cause by or for either plaintiff or defendant.

Thereupon the defendant by his counsel, made the following motion.

186 Mr. THOMAS: We desire to move to strike out the testimony elicited by the plaintiff from the witnesses Story and Corbett upon the ground that, as it stands, it neither proves nor tends to prove anything; that the testimony merely goes to show—giving it the best construction the plaintiff can ask for—that in the months of April, May, and June there was no active work so far as known, witnesses being ignorant as to what was actually going on at the mine and it being due to them to show the actual facts; also because the testimony sought to be elicited from these witnesses does not establish any positive fact with reference to the issues in the case; also because that testimony neither proves nor tends to prove that the plaintiff company was not doing business in Ouray county at the time and before the time of the commencement of these suits; also that the testimony neither proves nor tends to prove that any suspension of work at that time was a permanent suspension or a permanent cessation of doing business in the State or in the county; also the fact that no office existed in the town neither proves nor tends to prove that the company was not developing the mines which were situated some distance from the town; and also the mere fact if it be a fact, that the agent had moved to the adjoining county does not in any-

wise cancel or revoke the authority conferred upon him by the appointment of the plaintiff company, there being nothing in the statute and nothing in the law which provides for or would
187 countenance the proposition that he was required to live in the county under his appointment or that his removal from the county *ipso facto* or otherwise would affect his appointment. It does not appear either from the testimony of these witnesses or otherwise that the authority or agency of Mr. Jardine has ever been revoked; and also that, even conceding for the sake of argument that the lapse of time between his appointment and the time of the commencement of this action would give rise to any presumption to that effect, there is no evidence going to show that the defendant here or that the plaintiffs in the suits had any notice whatever of the revocation of authority.

The COURT: I understand then, that it is contended that there is no part of this property that stands in any different position from the balance of it.

Mr. PRESTON: Yes, the Norma mill site and the Yellow Rose——

The COURT: Yes, but does any part of the residue of the property stand in any different position?

Mr. THOMAS: Of course, we move, if your honor please, for instruction on the motion to strike out this testimony, and that the jury be instructed under the testimony as offered and received by the court that a verdict should be returned for the defendant.

The COURT: The court will not strike out the testimony but will instruct in view of the testimony.

188 To which ruling of the court counsel for defendant then and there duly excepted.

Thereupon counsel for plaintiff asked for a directed verdict, offering to state the specific ground upon which same was asked, but the court said that a general motion would cover every ground upon which a verdict might be directed.

Thereupon counsel for plaintiff made the following request for instruction to the jury, which instruction the court refused to give, viz: That the jury upon the evidence submitted should find the issues joined for the plaintiff except as to the Norma mill site and the Yellow Rose mill site.

To which action of the court in refusing to give said instruction the plaintiff by its counsel then and there duly excepted.

Thereupon the court of its own motion instructed the jury as follows:

The COURT: Gentlemen of the jury, in the view the court takes of this case, it becomes a question of law, and the court will instruct you to find a verdict in favor of the defendant and that the defendant is entitled to possession of the demanded premises.

To the giving of which instruction counsel for plaintiff then and there duly objected and excepted.

Thereupon the jury, without retiring from the room, returned into court the following verdict:

189 We, the jury in the above-entitled cause, find the issues herein joined in favor of the defendant, and that he is entitled to the possession of the demanded premises.

(Signed) GEORGE W. THOMPSON, *Foreman.*

To which verdict plaintiff, by its counsel, then and there objected and duly excepted.

Thereafter, and on the 21st day of June, A. D. 1902, came the plaintiff by its counsel and filed its motion to set aside the verdict of the jury herein and for a new trial, which said motion is in words and figures as follows, to wit:

Now comes The Cosmopolitan Mining Company, the plaintiff herein by its attorneys, and moves the court to grant it a new trial of the issues herein for the following reasons, to wit:

1. Because the court erred in admitting in evidence over the objection of the plaintiff the sheriff's deed, and to which ruling the plaintiff then and there excepted.

2. Because the court erred in admitting in evidence over the objection of the plaintiff the Defendant's Exhibit 1, and to which ruling the plaintiff then and there excepted.

3. Because the court erred in admitting in evidence over the objection of the plaintiff the Defendant's Exhibit 2, and to which ruling the plaintiff then and there excepted.

4. Because the court erred in admitting in evidence over the objection of the plaintiff the Defendant's Exhibit 3, and to which ruling the plaintiff then and there excepted.

5. Because the court erred in admitting in evidence over the objection of the plaintiff the Defendant's Exhibit 4, and to which ruling the plaintiff then and there excepted.

6. Because the court erred in admitting in evidence over the objection of the plaintiff the Defendant's Exhibit 5, and to which ruling the plaintiff then and there excepted.

190 7. Because the court erred in admitting in evidence over the objection of the plaintiff the Defendant's Exhibit 6, and to which ruling the plaintiff then and there excepted.

8. Because the court erred in admitting in evidence over the objection of the plaintiff the Defendant's Exhibit 7, and to which ruling the plaintiff then and there excepted.

9. Because the court erred in admitting in evidence over the objection of the plaintiff the Defendant's Exhibit 8, and to which ruling the plaintiff then and there excepted.

10. Because the court erred in admitting in evidence over the objection of the plaintiff the Defendant's Exhibit 9, and to which ruling the plaintiff then and there excepted.

11. Because the court erred in admitting in evidence over the objection of the plaintiff the Defendant's Exhibit 10, and to which ruling, the plaintiff then and there excepted.

12. Because the court erred in admitting in evidence over the objection of the plaintiff the Defendant's Exhibit 11, and to which ruling the plaintiff then and there excepted.

13. Because the court erred in admitting in evidence over the objection of the plaintiff the Defendant's Exhibit 12, and to which ruling the plaintiff then and there excepted.

14. Because the court erred in admitting in evidence over the objection of the plaintiff the Defendant's Exhibit 13, and to which ruling the plaintiff then and there excepted.

15. Because the court erred in admitting in evidence over the objection of the plaintiff the Defendant's Exhibit 14, and to which ruling the plaintiff then and there excepted.

16. Because the court erred in admitting in evidence over the objection of the plaintiff the Defendant's Exhibit 15, and to which ruling the plaintiff then and there excepted.

17. Because the court erred in admitting in evidence over the objection of the plaintiff the Defendant's Exhibit 16, and to which ruling the plaintiff then and there excepted.

18. Because the court erred in admitting in evidence over the objection of the plaintiff the Defendant's Exhibit 17, and to
191 which ruling the plaintiff then and there excepted.

19. Because the court erred in admitting in evidence over the objection of the plaintiff the Defendant's Exhibit 18, and to which ruling the plaintiff then and there excepted.

20. Because the court erred in refusing to rule as a matter of law that the plaintiff was entitled to recover the demanded premises except the Norma mill site and the Yellow Rose mill site and directing a verdict for the plaintiff as duly requested, and to which ruling the plaintiff then and there excepted.

21. Because the court erred in directing the jury to find a verdict for the defendant for the possession of all of the demanded lode claims and mill sites, and to which ruling the plaintiff then and there excepted.

22. Because the court erred in directing the jury to find a verdict for the defendant for the Norma Lode claim, and to which ruling the plaintiff then and there excepted.

23. Because the court erred in accepting and receiving the verdict of the jury rendered herein, and to which ruling the plaintiff then and there excepted.

24. Because the verdict is contrary to the law.

25. Because the verdict is contrary to the evidence.

26. Because the court erred in refusing to permit the plaintiff to introduce in evidence the paper purporting to be a motion or affidavit and signed by J. M. Jardine, and to which ruling the plaintiff then and there excepted.

27. Because the court erred in refusing to permit the plaintiff to prove by the witness Story that in the year 1897, the Cosmopolitan Mining Company had no office of any kind in the city of Ouray, and State of Colorado, and to which ruling the plaintiff then and there excepted.

28. Because the court erred in refusing to permit the plaintiff to prove by the witness Story that the Cosmopolitan Mining Company had no agent or officer in the city and county of Ouray and State

of Colorado in the year 1897, and to which ruling the plain-
192 tiff then and there excepted.

29. Because the court erred in refusing to permit the plaintiff to prove by the witness Story that the Cosmopolitan Mining Company was not doing any business in the State of Colorado in the year 1897, and to which ruling the plaintiff then and there excepted.

30. Because the court erred in refusing to permit the plaintiff to prove by the witness Story that the Cosmopolitan Mining Company was not doing any business in the county of Ouray during the year 1897.

(Signed) HURLBURT, JONES & CABOT,
" PERRY & BLISS,
" GEO. C. PRESTON,
Attorneys for Plaintiff.

Thereafter and on the 23rd day of June, A. D. 1902, came the plaintiff by its counsel, and the defendant, by his counsel, and argued before the court the said motion for a new trial, which motion the court then and there denied and ordered judgment to be entered upon the verdict herein.

To the denying of which motion, as well as to the order for judgment, plaintiff by its counsel then and there objected and duly excepted.

Thereupon and on the 23rd day of June, A. D. 1902, the court entered judgment upon the verdict of the jury in favor of the defendant and against the plaintiff.

To the entry of which said judgment the plaintiff by its counsel then and — objected and duly excepted and prayed to be
193 allowed a writ of error to the Supreme Court of the United States.

And inasmuch as the foregoing matters do not otherwise sufficiently appear of record, the plaintiff now here tenders its bill of exceptions and prays that the same may be signed, sealed, and made a part of the record; which is done accordingly this 15th day of August A. D. 1902.

J. A. MARSHALL, [SEAL.]
District Judge.

Approved:
CHARLES J. HUGHES, JR.,
Counsel for Defendant.

Approved,
C. S. THOMAS,
Of Counsel for Defendant.

(Endorsed:) No. 4107.—United States of America, district of Colorado.—In the circuit court.—Cosmopolitan Mining Company *v.* Thomas F. Walsh.—Bill of exceptions.—Filed Aug. 18, 1902, Robert Bailey, clerk.

Know all men by these presents, that we, the Cosmopolitan Mining Company, a corporation duly organized and existing under the laws of the State of Maine, as principal, and the Fidelity and Deposit Company of Maryland, a corporation duly organized
194 and existing under the laws of the State of Maryland, as surety, are held and firmly bound unto Thomas F. Walsh, in the full and just sum of five hundred (500) dollars to be paid to the said Thomas F. Walsh, his certain attorney, executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with out seals and dated this 11th day of August, in the year of our Lord one thousand nine hundred and two.

Whereas, lately at the November term, A. D. 1902, of the circuit court of the United States, for the district of Colorado in a suit depending in said court, between the above-bounden Cosmopolitan Mining Company as plaintiff and the said Thomas F. Walsh as defendant, a judgment was rendered against the said Cosmopolitan Mining Company and the said Cosmopolitan Mining Company having obtained a writ of error to the Supreme Court of the United States and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Thomas F. Walsh citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, that if the said Cosmopolitan Mining Company shall prosecute said writ of error to effect, and answer all damages and costs if it fail to
195 make its plea good, then the above obligation to be void; else to remain in full force and virtue.

COSMOPOLITAN MINING COMPANY, [SEAL.]
By JOHN A. PERRY, *Its Attorney-in-fact.* [SEAL.]
FIDELITY & DEPOSIT COMPANY
OF MARYLAND, [SEAL.]
By EDWARD F. BISHOP, *Member of Local Board.*

[Seal of F. & D. Co.]

Sealed and delivered in presence of—
Attest: WM. G. MAITLAND,
General Agent.

Approved by
J. A. MARSHALL,
U. S. District Judge for the District of Utah, Assigned to Hold the Circuit Court of the United States for the District of Colorado.

(Endorsed:) No. 4107.—United States circuit court, district of Colorado.—Cosmopolitan Mining Co. *vs.* Thomas F. Walsh.—Bond on writ of error.—Filed Aug. 18, 1902, Robert Bailey, clerk.

196 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Colorado, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Cosmopolitan Mining Company, plaintiff in error, and Thomas F. Walsh, defendant in error a manifest error hath happened, to the great damage of the said Cosmopolitan Mining Company as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 15th day of August, in the year of our Lord one thousand nine hundred and two.

[Seal United States Circuit Court, District of Colorado.]

ROBERT BAILEY,
Clerk United States Circuit Court, District of Colorado.

Allowed by—
J. A. MARSHALL,
U. S. District Judge for the District of Utah, Assigned to Hold Circuit Court of the United States for the District of Colorado.

196½ UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

In obedience to the command of the within writ, I herewith transmit to the honorable, the Supreme Court of the United States, a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In testimony whereof I hereunto subscribe my name, and affix the seal of the circuit court of the United States for the district of Colorado, at Denver in said district, this 15th day of September, A. D. 1902.

[Seal United States Circuit Court, District of Colorado.]

ROBERT BAILEY, *Clerk,*
By CHARLES W. BISHOP,
Deputy Clerk.

[Endorsed:] No. 4107 United States circuit court, district of Colorado. Cosmopolitan Mining Co. *vs.* Thomas F. Walsh Writ of error Filed Aug. 18 1902 Robert Bailey clerk.

197 UNITED STATES OF AMERICA, *ss:*

To Thomas F. Walsh, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the district of Colorado wherein Cosmopolitan Mining Company — plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable John A. Marshall, U. S. district judge for the district of Utah assigned to hold the circuit court of the United States for the district of Colorado this 15th day of August, in the year of our Lord one thousand nine hundred and two.

J. A. MARSHALL,
U. S. District Judge for the District of Utah, Assigned to Hold Circuit Court of the United States for the District of Colorado.

[Endorsed:] No. 4107 U. S. circuit court, district of Colorado. Cosmopolitan Mining Co *vs.* Thomas F. Walsh Citation Filed Aug. 18 1902 Robert Bailey clerk.

198 UNITED STATES OF AMERICA, } *ss:*
District of Colorado, }

I, Robert Bailey, clerk of the circuit court of the United States for the district of Colorado, do hereby certify the above and foregoing pages numbered from one (1) to one hundred and ninety-five (195) both inclusive, to be a true, perfect, and complete transcript and copy of the record and proceedings, and of all thereof, heretofore filed or entered of record in said court, and in a certain cause lately in said court pending wherein Cosmopolitan Mining Company was plaintiff and Thomas F. Walsh was defendant, as fully and completely as the same still remain on file and of record in my office at Denver.

In testimony to the above, I do hereunto sign my name and affix the seal of said court, at Denver in said district, this 15th day of September, A. D. 1902.

[Seal United States Circuit Court, District of Colorado.]

ROBERT BAILEY, *Clerk,*
By CHARLES W. BISHOP,
Deputy Clerk.

Endorsed on cover: File No. 18,675. Colorado C. C. U. S. Term No. 447. Cosmopolitan Mining Company, plaintiff in error, *vs.* Thomas F. Walsh. Filed October 2nd, 1902.

Pleas in the Circuit Court of the United States for the District of Colorado, Sitting at Denver.

Be it remembered, that heretofore, and on, to-wit, the twenty-third day of January, A. D. 1902, came C. M. Bliss, Esquire, attorney for plaintiff, and filed in said court and in a certain cause in said court then pending, wherein The Cosmopolitan Mining Company was plaintiff, and Thomas F. Walsh was defendant, a certain stipulation. And the said stipulation is in words and figures as follows, to-wit:—

UNITED STATES OF AMERICA, *State and District of Colorado,* } *ss:*

In the Circuit Court of the United States for the District of Colorado.

THE COSMOPOLITAN MINING COMPANY, Plaintiff,
vs.
THOMAS F. WALSH, Defendant. } Stipulation.

It is hereby stipulated and agreed by and between the parties hereto that at the time of the filing of this action the property involved exceeded two thousand dollars in value.

PERRY & BLISS,
GEO. C. PRESTON,
Attorneys for Plaintiff.
CHARLES J. HUGHES, JR.,
Attorneys for Defendant.

(Endorsed:) No. 4107 (law) In the U. S. circuit court, district of Colorado. Cosmopolitan Mining Company, plaintiff *vs.* Thomas F. Walsh defendant. Stipulation as to value of property involved. Filed Jan. 23, 1902. Robert Bailey, clerk.

UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

In the United States Circuit Court for the District of Colorado.

COSMOPOLITAN MINING COMPANY, Plaintiff,
vs.
THOMAS F. WALSH, Defendant.

The clerk will make transcript for Supreme Court of the United States, consisting of certified copies of the following files and records, viz: The complaint, the answer, the replication, the amended repli-

cation, the stipulation as to value, the bill of exceptions, the assignment of errors, the petition for writ of error, the judge's certificate, the writ of error, the supersedeas bond, the citation and return, all the orders of the court, and the judgment.

PERRY AND BLISS,
GEORGE C. PRESTON,
Attorneys for Plaintiff.

To Robert Bailey, clerk, Denver, Colorado, —— —, 19–.

(Endorsed:) No. 4107. United States circuit court, for the district of Colorado. Cosmopolitan Mining Company *vs.* Thomas F. Walsh, Præcipe for transcript U. S. Supreme Court. Filed Aug. 18, 1902, Robert Bailey, clerk. Perry & Bliss and Geo. C. Preston, attorneys for plaintiff.

UNITED STATES OF AMERICA, *District of Colorado,* } ss:

I, Robert Bailey, clerk of the circuit court of the United States for the district of Colorado, do hereby certify the above and foregoing to be a true, perfect, and complete transcript and copy of stipulation and præcipe for transcript heretofore had and filed in said court, and in a certain cause in said court pending wherein The Cosmopolitan Mining Company was plaintiff and Thomas F. Walsh was defendant, as fully and completely as the same still remain on file in my office, at Denver.

In testimony to the above, I do hereunto sign my name and affix the seal of said court at the city and county of Denver in said district, this twenty-sixth day of August, A. D. 1903.

[Seal United States Circuit Court, District of Colorado.]

ROBERT BAILEY, *Clerk,*
By —— ——, *Deputy Clerk.*

In the Supreme Court of the United States, October Term, 1902.

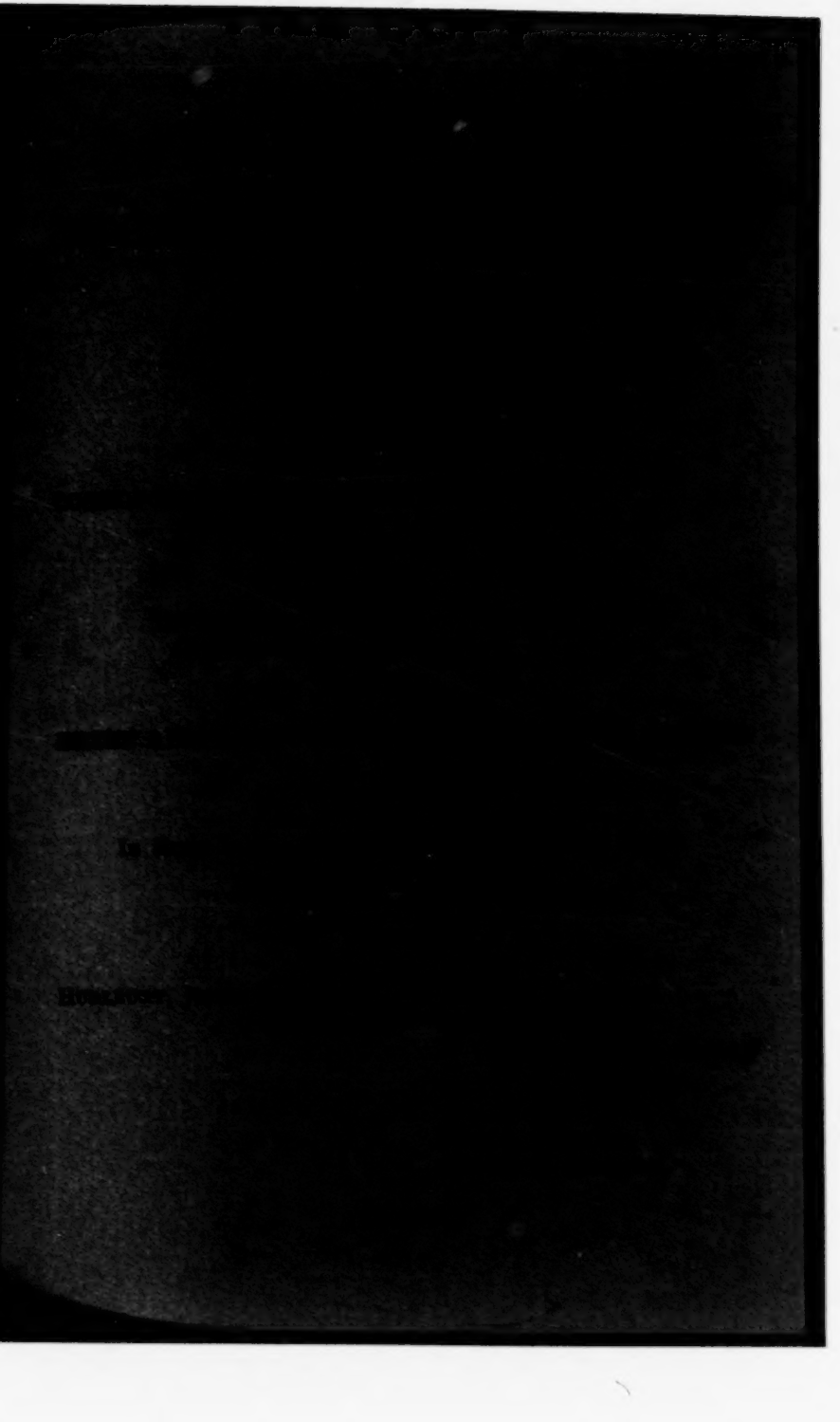
COSMOPOLITAN MINING COMPANY, Plaintiff in Error, *vs.* THOMAS F. WALSH, Defendant in Error.	No. 447. (18675.)	Stipulation.

It is hereby stipulated and agreed by and between the parties to the above entitled action that copies of the præcipe and stipulation as to the value of the property involved in this action, duly certified by the clerk of the circuit court of the United States in and for the

district of Colorado, may be filed and made a part of the transcript of record herein, said præcipe and stipulation being a part of the record in this case in said circuit court.

WILLIAM H. MOODY,
Attorney for Plaintiff in Error.
CHARLES S. THOMAS,
Attorney for Defendant in Error.

[Endorsed:] File No. 18,675. Supreme Court U. S. October term, 1903. Term No. 134 Cosmopolitan Mining Co., pl'ff in error, *vs.* Thomas F. Walsh. Stipulation of counsel and addition to record. Filed Sept. 15th, 1903.



11953

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1903.
No. 134.

COSMOPOLITAN MINING COMPANY,
Plaintiff in Error,
vs.
THOMAS F. WALSH,
Defendant in Error.

STATEMENT OF THE CASE.

This was an action in ejectment, brought November 3, 1900, by the plaintiff in error, a corporation organized and existing under the laws of the State of Maine, against the defendant in error, a citizen of the State of Colorado, in the United States Circuit Court for the District of Colorado, to recover from the defendant in error the possession of seven lode mining claims and five mill sites situated in Sneffles mining district in Ouray County, Colorado, of the value of more than two thousand dollars, together with nominal damages for the ouster and the costs of the action.

Plaintiff in error derives its title to the property in controversy through patents from the United States and mesne conveyances, all of which were admitted in evidence without objection to their form or sufficiency. (Folios 49 to 58.) The defendant in error offered to prove the payment of taxes and the expenditure of money by him upon the property, but the proof was excluded by the court below. (Folios 156 to 158.) Tax deeds conveying the Norma mill

site and the Yellow Rose mill site to the defendant in error were introduced in evidence and were not attacked in any way. It will therefore be admitted that plaintiff in error is the owner, and entitled to the possession, of all the property in controversy (except the above-named mill sites) unless its title has been divested by virtue of some subsequent proceedings. As constituting such proceedings the defendant in error relies, *first*, upon four judgments rendered by default in the County Court of Ouray County, Colorado, against the plaintiff in error, the sheriff's sale and deed made thereunder and a conveyance to himself from the sheriff's grantee, and, *second*, relies upon a decree, by default, obtained by him, against the plaintiff in error, in an action to quiet title in District Court of the County of Ouray.

*These proceedings are, in substance as follows:

The first suit brought in the County Court of Ouray County was that of The A. W. Begole Mercantile Company *against* Cosmopolitan Mining Company, the complaint being filed on or about April 26, 1895. The complaint alleges that the plantiff therein is a Colorado corporation, doing business in Ouray, and "that the defendant is a corporation duly incorporated and organized under and by virtue of the laws of the State of Maine, with its principal office in the State of Colorado, at Ouray, in said Ouray County." Judgment is prayed for the principal sum of $213.02, upon two causes of action, on account of merchandise alleged to have been furnished the defendant between May 8, 1894, and January 1, 1895. (Folios 118–119.) On April 26, 1895, the plaintiff filed a sufficient undertaking in attachment (Folio 120), and on the same day J. C. Marsh, as president of the plantiff corporation, made and filed a sufficient affidavit, in attach-

*Owing to the fact that portions of these proceedings were offered in evidence at different times, they are to be found at separate places in the transcript of record. For the convenience of the Court we have, in an appendix to the brief, set out the complete record of each proceeding in chronological order. The Colorado Statutes referred to in the argument will also be found in the appendix.

ment (Folio 121), and thereupon, on the same day, a writ of attachment was issued by the court to the sheriff of Ouray County, commanding him to serve a copy of the writ upon the defendant and attach its property (Folio 74). On the same day the sheriff of Ouray County made return of the writ of attachment by stating that he had levied upon and attached the property in controversy in the suit at bar, describing it, by filing a copy of the levy in the office of the recorder of Ouray County, but returned that he was unable to make service of the writ on the defendant, there being no person in his county upon whom process might be served. (Folio 75.) On April 29, 1895, a summons in the usual form was issued by the court which does not appear to have ever been in the hands of the sheriff of Ouray County, but was returned by the sheriff of San Miguel County, Colorado, May 7, 1895, in the following language: "I do hereby certify that I have served the within summons, together with a copy of the complaint in the within stated action, on this 7th day of May, A. D. 1895, by personally delivering a true copy of said summons, together with a copy of the original complaint in the action therein mentioned, thereto attached, to J. M. Jardine, the duly authorized agent of the within defendant company." (Folios 122–123). On April 29, 1895, another writ of attachment was issued by the Court addressed to the sheriff of San Miguel County, being a duplicate of the first writ of attachment, and the sheriff made the following return thereon: "I do hereby certify that I have duly executed the within writ on this 7th day of May, A. D. 1895, by delivering a true copy of the within writ to J. M. Jardine, the duly authorized agent of the within defendant company." (Folio 124.) On June 27, 1895, default was entered and judgment was rendered against the defendant for $226.09, and $24.58 costs, and the attachment was sustained and a special execution ordered. (Folios 70–71.) On July 23, 1895, a special execution was issued by the Court to the sheriff of Ouray County, which

recites the attachment of the property, describing it, and recites that judgment was rendered against the Cosmopolitan Mining Company in favor of The A. W. Begole Mercantile Company for $226.09, and $24.58 costs. The writ of execution then proceeds as follows: "We therefore command you, that you immediately proceed to sell the property by you levied upon, as hereinbefore described, or so much thereof as is necessary to make the aforesaid sums of money, with interest on said judgment, from the day of the rendition of the same; and to have the same money ready, as soon as may be, to render unto the said court for adjustment according to law, allowing the several judgment-creditors in proportion to the amount of their several claims as adjusted." The sheriff of Ouray County made return of the execution as follows: "In obedience to the command of the within execution, I have executed the within writ by offering for sale on the 24th day of August, 1895, in the manner provided by law, and selling the property described in said writ, at public sale at the front door of the court-house in the City and County of Ouray, Colo., that said mining claims were first offered for sale separately; receiving no bids on said claims I offered the same for sale all together. That in accordance with an agreement entered into by and among the several prorating creditors, the same were struck off and sold to J. C. Marsh, as trustee for the several judgment-creditors, for the sum of $1,616.97; and I therefore return this execution fully satisfied." (Folios 126 to 128.)

The second action brought in the County Court of Ouray County was that by John Ashenfelter *against* Cosmopolitan Mining Company. The complaint was filed on or about May 21, 1895. The allegation that the defendant was a foreign corporation with its principal office in Colorado, at Ouray, is the same as that quoted from the complaint in the foregoing case of The A. W. Begole Mercantile Company. This complaint sets up a cause of action on account of work and labor to the amount of $47.90, performed for

the defendant between June 1, 1894, and December 31, 1894; alleges that suit has been brought by The A. W. Begole Mercantile Company and prays to be made a party plaintiff therein. The affidavit and bond in attachment, summons, writs of attachment with the returns of the sheriffs of Ouray and San Miguel counties thereon, are all substantially the same as those found in the action brought by The A. W. Begole Mercantile Company, except that the sheriff of Ouray County in his return of the writ of attachment does not state that he could find no person in his county upon whom process might be served. (Folios 105 to 110.) On June 27, 1895, default and judgment for the sum of $49.82 and $22.70, costs, were entered against the defendant (Folios 67 and 68), and on July 23, a special execution was issued directed to the sheriff of Ouray County which, except that it differs in the amount to correspond with the judgment obtained by Ashenfelter, is the same as the execution in the case brought by The A. W. Begole Mercantile Company. (Folio 115.) The sheriff of Ouray County made the following return of this execution, viz: "I hereby return the within execution fully satisfied in accordance with my return made on the execution issued in the case of The A. W. Begole Mercantile Company *vs.* the Cosmopolitan Mining Company." (Folio 115.)

The third action brought in the County Court of Ouray County was that of P. H. Fennell *against* The Cosmopolitan Mining Company. The complaint was filed on or about the 23d day of May, 1895. The first cause of action was for $58.75, for work and labor performed for the defendant between June 30, 1894, and August 1, 1894, and the second cause of action was for a like amount for work and labor performed by one John Dowd, between the same dates, the account having been assigned to the plaintiff. (Folios 131–132.) All of the record in this case is the same as that in the foregoing case of John Ashenfelter *against* the Cosmopolitan Mining Company (Folios 131 to 141), except that default, and judgment for $126.12, and

$22.82 costs, were entered against the defendant on July 10, 1895. (Folio 76.)

The fourth case brought in the County Court of Ouray County was that of William C. Fulton *against* Cosmopolitan Mining Company. The complaint was filed on or about May 25, 1895, and contains the following allegation: "That defendant is a corporation duly organized under the laws of ————." The complaint asked for judgment on account of work and labor performed in the working of the Hidden Treasure mine prior to November 4, 1893, for the sum of $922.80. (Folio 144.) The complaint makes no mention of the suit brought by The A. W. Begole Mercantile Company nor does it ask that Fulton be made a party plaintiff therein. An undertaking in attachment was filed May 25, 1895, and, on the same day, an affidavit in attachment was made and filed. In this affidavit it is stated: "That the defendant is a foreign corporation." (Folio 145-146.) A writ of attachment was issued by the court on June 13, 1895, addressed to the sheriff of Ouray County. It does not appear that this sheriff did anything with the writ or attempted to make any levy under it. The sheriff of San Miguel County makes the return, which is the same as those made by him in the other cases. (Folio 147-148.) The summons was issued on June 13, 1895, and was returned by the sheriff of San Miguel County June 22, 1895, in the same manner as the preceding cases. (Folio 149-150.) On July 26, 1895, default and judgment for the sum of $1,049.90, were entered against the defendant, and a special execution ordered. A general execution was issued by the court on July 27, 1895, addressed to the sheriff of Ouray County, which recites the rendition of the judgment, makes no reference to an attachment, but commands the sheriff to make the amount of the judgment and $15.40 costs out of the general property of the defendant, and adds "And have you these moneys ready to render to the said court for damages for adjustment among the several judgment-creditors in proportion to the amount of their respec-

tive claims, and costs aforesaid." (Folio 151). This execution was returned as satisfied by the sale made in the case of The A. W. Begole Mercantile Company *against* The Cosmopolitan Mining Company, in the same manner as that in the returns of the special execution in the actions brought by John Ashenfelter and P. H. Fennell. (Folio 151.) The record in this case brought by William C. Fulton was not admitted in evidence by the court below. (Folio 153.)

In the files of the action brought by The A. W. Begole Mercantile Company appears a document entitled a "Prorating Order." It is unsigned, bears no date nor any evidence of having been filed or entered in the case. It recites that the plaintiff has made a motion for an order prorating the amount to be realized from the sale of the attached property by the several attaching and judgment creditors; recites that the following judgments have been rendered against The Cosmopolitan Mining Company by virtue of several attachments, viz: "The A. W. Begole Mercantile Co., $226.09; John Ashenfelter, $49.82; P. H. Fennell, $126.12; W. C. Fulton, $1,049.90; and D. L. Golden, $," and orders the Sheriff of Ouray County to sell the attached property or so much thereof as shall be necessary to satisfy the several judgments. In case the amount realized is insufficient for this purpose it is ordered that the costs of the several proceedings be paid in full and the balance prorated among the judgment-creditors except Golden, whose judgment was said to be settled. (Folios 128-129).

On May 27, 1895, J. M. Jardine, upon whom all of the process in all of the foregoing actions was served, filed, in the case brought by The A. W. Begole Mercantile Company, the following sworn statement:

"Comes now J. M. Jardine, upon whom papers purporting to be a summons and writ of attachment in the above-entitled cause were served on May 8, 1895, and respectfully represents to the court:

1st. "That he is not, and has not been for several years

past, a resident of Ouray County in said State, and therefore could not be an Agent of defendant company in accordance with the general laws of this State under the facts alleged in the complaint herein.

2d. "That he has not for years acted as agent of said company defendant, does not consider himself or hold himself out to be such agent and refuses to accept service or do any other act on behalf of said defendant." (Folios 162-163.)

This statement was excluded by the court below. (Folio 164.)

Copies of a resolution of the plaintiff in error designating Ouray as its principal place of business and designating J. M. Jardine as its process agent, dated December 16, 1885, certified by the clerk and recorder of Ouray County and by the secretary of state of Colorado, together with a statement that such designation had not been revoked, was received in evidence over the objection of plaintiff in error, and to which ruling an exception was taken. (Folios 64-65.)

Plaintiff in error introduced the testimony of the witnesses William Story and Maurice Corbett, the sheriff of Ouray County, showing or tending to show that, at the time these suits were brought in the County Court of Ouray County, it had no office in Ouray. (Folios 171, 172, 173, 174, 178 and 179.)

On March 1, 1897, the defendant in error brought suit against the plaintiff in error and J. M. Jardine, in the District Court of Ouray County, Colorado, by filing a complaint. The complaint alleges:

"The defendant is a corporation organized under the laws of the State of Maine, for the purpose, among others, of carrying on a mining business in the County of Ouray and State of Colorado, and by certificate dated December 16, 1885, recorded in Book C–1, page 291, on January 21, 1886, the said J. M. Jardine, afterwards was, as required by the laws of the State of Colorado, duly appointed as the authorized agent of the defendant company, upon whom process might be served."

The complaint further recites the proceedings in the foregoing actions brought by The A. W. Begole Mercantile Company, John Ashenfelter and P. H. Fennell, including the sale to J. C. Marsh, as Trustee; the assignment of the certificate of purchase by Marsh to one Osborn and the conveyance of the property to the plaintiff (Walsh) by Osborn. The complaint further alleges that plaintiff is in actual and peaceable possession of the property, is the owner in fee thereof and is expending large sums of money thereon; that notwithstanding the proceedings in the County Court the defendants claim they still hold some interest in the property, adverse to the said claim of the plaintiff, and that the plaintiff is prevented thereby from obtaining necessary assistance and capital for the development of the property. It is then prayed that the defendants be required to come into court, specify the nature of their claims and have them adjudicated; that it be determined by the court that the defendants have no right, title or interest in the property, and that plaintiff be given general relief. (Folios 82, 83, 84.)

On March 1, 1897, a summons, in the usual form, was issued by the court, upon which the sheriff of Ouray County made the following return:

"I do hereby certify that I have served the within summons together with a copy of the complaint in the within-stated action on this 4th day of March, A. D. 1897, by personally delivering a true copy of said summons, together with a copy of the original complaint in the action therein mentioned thereto attached, to the within-named defendants, Cosmopolitan Mining Company and the said J. M. Jardine, at Ouray in said County. I further certify that the service of the summons and complaint upon the The Cosmopolitan Mining Company was made by delivering to John M. Jardine, the duly authorized agent of the defendant company and designated by it as the person upon whom service should be made, a copy of said summons with a copy of the complaint attached specially for said defendant company." (Folios 86-87.)

On the next day, March 5, 1897, the defendant Jardine filed an answer stating that he had no interest in the matter except that process in the County Court cases had been served upon him as agent of the defendant company; that he had mailed the papers to the president of the defendant company with return card on the envelope; that the letters had not been returned to him, nor was he instructed to defend the suits, and knew of no defense and therefore allowed judgments to be taken, and that since the entry of the judgments and sale thereunder he does not claim any interest in the property. (Folio 85.) On March 25, 1897, the default of the defendant Cosmopolitan Mining Company was entered (Folio 88), and on May 11, 1897, a decree was entered, which recited the default of the defendant Cosmopolitan Mining Company after due service of summons, and that the evidence of the plaintiff had been taken and documentary evidence examined. The decree then makes findings in substantially the same language as that used in the bill of complaint and then decrees as follows:

"That the said defendants have not nor has either of them any right, title, interest, claim or demand in or to any part of the premises above described and that the pretended claim of the defendant The Cosmopolitan Mining Company in and to said premises is wholly without right or justification of law. That the plaintiff is the owner and in possession of the premises and mining claims above described and entitled to the quiet and peaceable possession of said mining claims and each of them." (Folios 89 to 92.)

Plaintiff in error offered, but was not allowed, to prove that it was not doing business in Colorado at the time of the bringing of this suit to quiet title, unless it should also prove that it had not designated a process agent. (Folios 165-166.)

The plaintiff in error made a motion for a directed verdict in its favor as to all of the property in the controversy, except the Norma and Yellow Rose mill sites, which was

denied, and upon motion of the defendant in error a verdict was directed in his favor. (Folio 188.)

Exceptions were taken to the adverse rulings of the court below and errors assigned thereon (Folio 41), and the Transcript purports to contain the entire record, Folio 198.

The contention of plaintiff in error in this case is that the four judgments rendered in the County Court and the decree entered in the District Court of Ouray County were rendered and entered without jurisdiction in the respective courts, for the lack of due service of process upon the plaintiff in error; that the sale made under the four judgments in the County Court was void, for want of jurisdiction in the court, and lack of authority in the officer; and that the effect of these proceedings is to deprive plaintiff of its property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States.

The question of the validity of these judgments, of the sale made thereunder and of the decree is raised by the pleadings in the case, the objections of plaintiff in error to their admission in evidence and by a motion by plaintiff in error for directed verdict.

SPECIFICATION OF ERRORS.

The following are specifications of the errors, upon which the plaintiff in error relies for a reversal of the judgment of the trial court, and they are arranged, as far as possible, in the order in which they will be discussed.

1. The court below erred in admitting in evidence the records of the cases wherein The A. W. Begole Mercantile Company (Defendant's Exhibits 9, 10 and 19), John Ashenfelter (Defendant's Exhibits 8 and 20) and P. H. Fennell (Defendant's Exhibits 11 and 21) were plaintiffs, respectively, and Cosmopolitan Mining Company was defendant, in the County Court of Ouray County, Colorado; said records consisting of certified copies of the complaints, summons with the returns endorsed thereon, affidavits in

attachment, undertakings in attachment, writs of attachment with the returns endorsed thereon. defaults, judgments, judgment dockets, prorating order of sale and writs of special execution with the returns endorsed thereon; each of which records shows that Cosmopolitan Mining Company "is a foreign corporation, organized under the laws of the State of Maine with its principal office in the State of Colorado at Ouray, in Ouray County; that service of the summons, complaints and writs of attachment were made upon J. M. Jardine, in San Miguel County, Colorado, as the "duly authorized agent" of Cosmopolitan Mining Company; and that said defendant company made default, and the property in controversy in this action was sold, to satisfy the judgments rendered in those cases, but which records fail to show that Cosmopolitan Mining Company was doing business in the State of Colorado at the time of the commencement of any of the actions, or at the time any service of process was made therein, and fail to show that J. M. Jardine was such an agent as to authorize the service of process upon him, and show that he was not served in the county of the action. (Assignment of Errors Nos. 7, 8 and 9, Folios 44-46, pp. 21 and 22.)

2. The court below erred in admitting in evidence defendant's Exhibits No. 5 and No. 6, consisting of copies of the resolution of plaintiff in error designating Ouray, Ouray County, as the principal place where the business of plaintiff in error was to be carried on in Colorado, and appointing J. M. Jardine its agent upon whom process might be served, certified respectively by the clerk and recorder of Ouray County and by the secretary of state of Colorado. (Assignments of Errors 1-2, Folios 41-42, p. 20.)

3. The court below erred in admitting in evidence Defendant's Exhibit No. 7, in which it is certified that the designation of Ouray as the principal place of business and the appointment of J. M. Jardine as process agent had never been revoked of record. (Assignment of Errors No. 3-4, Folio 42, p. 20.)

4. The court below erred in excluding the notice (Plaintiff in Error's Exhibit R) filed by J. M. Jardine in the case of The A. W. Begole Mercantile Company *vs.* Cosmopolitan Mining Company (Defendant in Error's Exhibits 9-10-19) which notice stated that Jardine had not acted as agent for the Cosmopolitan Mining Company for some years prior to service upon him as agent and that he refused to act as such agent (Assignment of Errors No. 10, Folio 45, p. 22) and which notice is quoted in full in the foregoing statement of the case.

5. The court below erred in admitting in evidence the record in the case of Walsh *vs.* Cosmopolitan Mining Company and J. M. Jardine, in the District Court of Ouray County (Exhibit 13 of Defendant in Error) consisting of certified copies of the complaint, the answer of J. M. Jardine, writ of summons and the return endorsed thereon, the præcipe for a default, the order of default, the transcript of the judgment docket and the decree, which record shows that Cosmopolitan Mining Company, defendant therein is a foreign corporation, "organized for the purpose, among others, of carrying on a mining business in the County of Ouray and State of Colorado;" that J. M. Jardine was by certificate dated December 16, 1885, recorded January 21, 1886, appointed its agent upon whom process might be served; that service was made March 4, 1897, upon said Jardine as such agent; that the defendant company made default; that a decree was entered finding that the plaintiff, Walsh, was the owner of the property and that Cosmopolitan Mining Company had no right, title or interest therein, but which record wholly fails to show that Cosmopolitan Mining Company was doing business in the State of Colorado, at the time such action was commenced or the service therein made. (Assignment of Errors No. 5, Folios 42-43, pp. 20 and 21.)

6. The court below erred in refusing to allow plaintiff in error to introduce testimony to prove that it was not doing business in the State of Colorado; and that it had no

office in Ouray County, Colorado, at the time of the institution of the action (Defendant's Exhibit 13) in the District Court of Ouray County, Colorado, wherein Thomas F. Walsh was plaintiff and Cosmopolitan Mining Company was defendant. (Assignment of Errors Nos. 11-12, Folio 46.)

7. The court below erred in refusing to direct the jury to return a verdict for the paintiff in error. (Assignment of Errors No. 14, Folio 47, p. 22.)

8. The court below erred in giving the following instruction to the jury, viz:

"Gentlemen of the jury, in the view the court takes of this case it becomes a question of law and the court will instruct you to find a verdict in favor of the defendant and that the defendant is entitled to the possession of the demanded premises." (Assignment of Errors No. 15, Folio 47, p. 23.)

ARGUMENT.

Jurisdiction of This Court:

This case comes to this Court on writ of error, directly, from the Circuit Court of the United States for the District of Colorado, and the first question presented may, therefore, be deemed to be the jurisdiction of this Court to hear and determine the case.

It was brought here under that clause of Section 5, 26 U. S. Statutes, 828, which provides that where the construction or application of the Federal Constitution is involved, an appeal or writ of error may be taken to this Court from the Circuit Courts. We submit that the application of that portion of the Fourteenth Amendment to the Constitution of the United States which provides that no person shall be deprived of his property, without due process of law, is involved in the case at bar, and that the determination of this question was necessary to a decision of the case in the court below, and is necessary here.

The question was raised at the first opportunity by plain-

tiff in error in the court below, by its amended replication. (Folios 29 and 30.) It was raised again, at the trial, by the specific objections of plaintiff in error to the admission in evidence of the records in the four actions in the County Court of Ouray County, and of the record of the suit to quiet title in the District Court of Ouray County. (Folios 94 and 95–153.) It was also raised in the rejection of Jardine's affidavit that he was not the agent of plaintiff in error, and the question was again presented by the motion of plaintiff in error for a directed verdict, all of which is duly certified by the judge of the trial court. (Folio 40.)

The judgments of the County Court of Ouray County are attacked solely upon the ground that they were rendered without due process of law, inasmuch as the court never obtained jurisdiction over this plaintiff in error. The judicial sale made under these judgments is attacked on the sole ground that we were thereby deprived of our property without due process of law. And the decree rendered by the District Court of Ouray County, in the suit to quiet title, is attacked upon the ground that it was rendered without due process of law, both because the court had no jurisdiction over plaintiff in error, and because it had no jurisdiction to render such a decree, in that action, aside from the question of service.

Practically the only questions involved in this case are therefore those which present the application of the Fourteenth Amendment to the Federal Constitution.

It is true that the court below, so far as the complaint therein shows, acquired jurisdiction by reason of diverse citizenship of the parties. The complaint, however, could not have raised the constitutional question, because plaintiff in error could not know that the defendant in error would rely upon the judgments and proceedings that present the question.

As soon as these proceedings and judgments were set up in defense, plaintiff in error raised the question as we have shown. We submit that the case at bar falls within the

doctrine announced by this court in the case of Loeb *vs.* Columbia Township Trustees, 179 U. S., 472, 477, 481. That case differs, substantially, from the case at bar, only in the fact that the question involved there was the invalidity of a State statute, as being in contravention of the Federal Constitution, instead of the question of the application of the Federal Constitution, as in this case. Section 5, of 26 Stats. supra, gives the same right to come here by writ of error on the one question as on the other. The facts in that case were that Loeb sued the town of Columbia on certain of its bonds, in the Circuit Court of the United States for the Southern District of Ohio; the sole ground of Federal jurisdiction being diversity of citizenship. The town defended on the ground, among others, that the statute of Ohio, under which the bonds were issued, was invalid under the Constitution of the United States. This defense was sustained and the plaintiff brought the case directly to this court on error. This court held that it had jurisdiction, notwithstanding the fact that the petition showed only diversity of citizenship as ground for jurisdiction in the court below, since the act gave this court jurisdiction in "any case" where a State statute was claimed to be in contravention of the Constitution of the United States, and that it was immaterial whether the question was raised by the plaintiff or the defendant.

See also Holder *vs.* Aultman, 169 U.S., 81, 88, 89.

Connelly *vs.* Union S. P. Co., 184 U.S., 540, 544, 545.

And this court has recently taken jurisdiction both on appeal from, and error to, the Circuit Courts, where the only question involved was "due process of law" in obtaining service on foreign corporations not doing business in the State at the time of service.

Conley *vs.* Alkali Works, 190 U. S., 406.

Geer *vs.* Alkali Works, 190 U. S., 428.

II.

The next question presented is that of our right to attack, collaterally, the judgments of the County Court, and the decree of the District Court, of Ouray County, relied upon by the defendant in error. These judgments, and the decree, were rendered by superior courts of record, of the State of Colorado, whose territorial limits are coextensive with that of the Federal District of Colorado, and we have brought this action in the Federal Circuit Court for that district, and are attacking the judgments and decree, collaterally, by evidence outside the records as well as on account of matters appearing or failing to appear in the records.

The precise question was presented to this Court in the case of Cooper *vs.* Newell, 173 U. S., 555, 565, 568, 572, and it was held that such a judgment was a foreign judgment in the Federal courts, and could be attacked collaterally by extrinsic evidence.

See also Howard *vs.* de Cordova, 177 U. S., 609, 613.

It was not only proper for plaintiff in error to attack these judgments collaterally, but that was the only way in which, according to correct legal and equitable principles the attack could be made, and certainly the only way in which an attack could be made in the Federal Court.

Holland *vs.* Challen, 110 U. S., 15, 25.

McConnihay *vs.* Wright, 121 U. S., 201, 206.

III.

Plaintiff in error contends that the judgments rendered by the County Court of Ouray County, in the actions brought against it by The A. W. Begole Mercantile Company, John Ashenfelter and P. H. Fennell were void for lack of jurisdiction over plaintiff in error.

The first position taken by plaintiff in error, in making this contention, is that these judgments were in personam notwithstanding the attachments; that, if in personam, they were void:

(*a*) Because the records fail to show, affirmatively, that plaintiff in error, a foreign corporation, was doing business in Colorado at the time process was served, and that if it be conceded that the allegation "with its principal office in the State of Colorado, at the City of Ouray, in said Ouray County," was sufficient to show, prima facie, the presence of plaintiff in error in the State, the allegation is disproved by the returns of the officers in the records and by the evidence in the case at bar.

(*b*) Because the records show, affirmatively, that process was served, upon a person as agent of plaintiff in error, outside the county where the suit was brought; and

(*c*) Because the records fail to show, affirmatively, that J. M. Jardine, upon whom service of process was made as the agent of plaintiff in error, was an agent of such character as to authorize such service, and proof of the character of such agent cannot be made by evidence outside the record.

The second position taken by plaintiff in error is that, conceding the judgments to have been in rem, they were, nevertheless, void:

(*a*) Because the records show affirmatively that the statutes of Colorado, providing for service of process in actions in rem, were not compiled with, and leave no room for any presumption in favor of due service and

(*b*) Because, under the laws of Colorado, the court did not obtain jurisdiction to render a judgment or to condemn and sell the property by the mere levy of the writ of attachment, legal service of the summons and writ of attachment being necessary to confer this jurisdiction.

The third position, taken by plaintiff in error, is that these judgments were void, because J. M. Jardine was not the agent of plaintiff in error, when service was made upon him and that due notice was given of that fact before any judgment was entered.

1. The judgments were in personam. In all these attachment cases in the County Court of Ouray County, the

only service attempted was the service upon J. M. Jardine as the agent of plaintiff in error. This was purely personal service within the State.

In determining, from the nature of the service whether the action is an action in rem or an action personam, the rule may be stated thus: That if the service be personal within the State the action is in personam whether the defendant appears or not, if the service be by publication, and the defendant appears, the action is in personam; if the service is by publication, or other constructive service, and the defendant fails to appear, the action is in rem or quasi in rem and only affects property over which the court has acquired jurisdiction.

3 Am. and Eng. Enc. of Law, 2nd Ed., pp. 185–6.

In the case of Cooper *vs.* Reynolds, 10 Wallace, 309, Mr. Justice Miller says, on page 318, in discussing the distinction between actions in rem and actions in personam, where service had been made by publication:

"If the defendant appears the cause becomes merely a suit in personam with the added incident that the property attached remains liable, under the control of the court, to answer to any demand which may be established against the defendant by the final judgment of the court. But if there is no appearance of the defendant and *no service of process on him*, the case becomes in its essential nature a proceeding in rem, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff."

In the case of all of the judgments the process was served upon J. M. Jardine as an agent of this plaintiff. The actions were therefore begun and prosecuted to judgments as personal actions based upon such personal service. If the action is to be deemed in rem it must be prosecuted according to the law governing proceedings in rem.

Cooper *vs.* Newell, 173 U. S., 555, 572, *supra.*

Moreover, an examination of the records of these cases will show that both court and counsel treated the judg-

ments as judgments in personam, and that there was no attempt to render a judgment in rem, strictly so called.

After the time for answer had expired a regular default was entered, not against the property, but against the defendant company, and the judgments were rendered for the full amounts of the several plaintiffs' claims "including interest to date," together with costs of the action, and such judgments concluded with the sentence "for which judgment let special execution issue," showing conclusively that the executions were issued to satisfy judgments, against the defendant company, rendered upon service made on J. M. Jardine as agent of the company. (Folios 70-71, p. 36; Folios 75-76, pp. 39-40; Folios 67-68, p. 34.)

We cite the following authorities which hold that a judgment in an attachment case, which is based on personal service, is a judgment in personam:

Conn *vs.* Caldwell, 1 Gill. (6 Ill.), 531, 536.
Bowers *vs.* Town, 12 Mich., 229, 232.
Drake on Attachment, p 5, 7th Ed.

(*a*) If these judgments were in personam it is necessary for the records to show that the defendant foreign corporation was doing business in Colorado when the actions were brought and process served.

At common law, the State, and therefore its courts, had no jurisdiction over a foreign corporation to render a judgment in personam, for the reason that such a corporation was regarded as the mere creature of the State by which it was chartered, and to be without the power of migrating beyond the territorial limits of such State.

Clark *vs.* N. J. Steam Nav. Co., 1 Story, 531, 538.
Peckham *vs.* Haverhill, 16 Pick., 275, 286.
Middlebrook *vs.* S. F. Co., 14 Conn., 301, 305.

As corporations extended their business into other States, under interstate comity, the doctrine of the common law was found to work a hardship upon the citizens of such other States, and the right of the State to prescribe reason-

able terms upon which a foreign corporation could do business within its borders, was recognized at an early date. Among these terms was the condition that the corporation should be liable to be personally served with process while doing business in the State.

Railroad Co. *vs.* Kountz, 104 U. S., 5, 10.
N. E. M. Ins. Co. *vs.* Woodworth, 111 U.S.,138, 146.

Where there is no statutory provision authorizing a judgment in personam against a foreign corporation, no such judgment can be rendered against such corporation, although it is doing business in the State when its agent is personally served with process, and where there is such a statutory provision the terms of the statute must be strictly followed.

Andrews *vs.* Cent. R. R. Co , 99 Mass., 534, 535.
Desper *vs.* Cont. W. M. Co., 137 Mass., 252, 253.
Hartford F. Ins. Co. *vs.* Owens, 30 Mich , 441, 444.
M.B.& I.Works *vs.* Circuit Judge, 73 Mich., 155,157.

The jurisdiction exercised over foreign corporations, even by courts of superior jurisdiction, is therefore purely statutory, and the presumptions that ordinarily exist in favor of the judgments of superior courts of general jurisdiction are not indulged in, when the defendant is a foreign corporation; but the facts conferring such jurisdiction must appear affirmatively from the record.

The case of St. Clair *vs.* Cox, 106 U. S., 350, is a leading case upon this subject. In that case the plaintiff brought suit against the defendants in the Circuit Court of the United States for the Eastern District of Michigan, upon promissory notes that had been assigned to the plaintiff by the Winthrop Mining Company, an Illinois corporation. The defense made was that the notes had been assigned after maturity and were therefore subject to a set off by reason of a judgment, obtained by the defendants, against the Winthrop Mining Company in the Circuit Court of Marquette County, Michigan. There had been an attachment of property in the case in the State court, and it ap-

peared that the Michigan statutes in reference to service in attachment cases had be complied with, and no question was raised as the validity of the judgment in rem, but the objection to the use of the judgment in set off, as a judgment in personam, was sustained on the ground that it did not appear that the Winthrop Mining Company was doing business in Michigan at the time service was made in the action in the State court. The case was brought to this court on error, and the only error assigned was the ruling of the court below in excluding the record of the judgment in the State court. This court held, that in order to entitle the record to admission in evidence, it must appear *affirmatively from the record*, that the foreign corporation was doing business in the State at the time of service of process; and says, on pp. 359 and 360.

"Without considering whether authorizing service of a writ of attachment as a summons on some of the persons named in the statute, a member, for instance, of the foreign corporation, that is a mere stockholder, is not a departure from the principle of natural justice mentioned in Lafayette Insurance Company *vs.* French, 18 How., 404, which forbids condemnation without citation. It is sufficient to observe that we are of the opinion that when service is made within the State upon an agent of a foreign corporation, it is essential, in order to support the jurisdiction of the court, to render a personal judgment, that it should appear somewhere in the record, either in the application for the writ or accompanying its service, or in the pleadings or the findings of the court, that the corporation was engaged in business in the State. The transaction of business by the corporation in the State, general or special, appearing a certificate of service by the proper officer on a person who is its agent there, would, in our opinion, be sufficient prima facie evidence that the agent represented the company in the business. It would then be open, when the record is offered as evidence in another State, to show that the agent stood in no representative character to the company, that his duties were limited to those of a subordinate employe, or to a particular transaction, or that his agency had ceased when the matter in said suit arose.

"In the record, a copy of which was offered in evidence in this case, there was nothing to show, so far as we can see, that The Winthrop Mining Company was engaged in business in the State *when service was made on Colwell.* The return of the officer, on which alone reliance was placed to sustain the jurisdiction of the State court, gave no information on the subject. It did not therefore, appear, even prima facie, that Colwell stood in any such representative character to the company as would justify the service of a copy of the writ on him. The certificate of the sheriff, in the absence of this fact in the record, was insufficient to give the Court jurisdiction to render a personal judgment against a foreign corporation. The record was therefore properly excluded."

The case of St. Clair *vs.* Cox, supra, is followed by the Circuit Court of the United States for the Southern District E. D. of Ohio, in the case of United States *vs.* American Bell Telephone Company *et al.*, 29 Fed., 17, 33-36. In that case it appeared from the return of the officer, inferentially at least, that the American Bell Telephone Company, a Massachusetts corporation, was doing business in the District, as a partner and through the agency of a local telephone company, and shows a service upon the president of the local company. To this return The American Bell Telephone Company interposed both a motion to quash and a plea in abatement. In sustaining both the motion and the plea, on the ground that the return failed to show compliance with the Ohio statute, and the return stated the conclusions of the officer rather than what had been done under the writ, on page 33, Jackson, J., says:

"No presumptions are to be indulged in favor of such a return, so as to give the Court jurisdiction over non-resident corporations.

"Alexandria vs. Fairfax, 95 U. S., 780.

"Grace *vs.* American Insurance Company, 109 U. S., 283. * * *

"Our conclusion, therefore, is that, under the allegations of the bill, the statements of the subpœnas, and the recitals of the returns, no valid or legal personal or con-

structive service on the American Bell Telephone Company is affirmatively shown such as will require it to appear and make defense herein, or suffer the consequence of a default; and that said company's motion to quash said service for defects or insufficiency in law or illegality appearing on the face of the returns should be sustained."

And again pp. 34 and 35;

"Without undertaking to review the authorities on the subject of a corporation's liability to suit in a State or district other than that of its creation, we think the decisions of the Supreme Court have settled and established the proposition that, in the absence of a voluntary appearance, three conditions must concur or co-exist in order to give the Federal court jurisdiction in personam over a corporation created without the territorial limits of the State in which the court is held, viz: (1), It must appear as a matter of fact that the corporation is carrying on its business in such foreign State or district; (2) That such business is transacted or managed by some agent or officer appointed by and representing the corporation in such State; and (3) the existence of some local law making such corporation, or foreign corporations generally, amenable to suit there as a condition, express or implied, of doing business in the State."

And again on pages 35 and 36:

"It cannot be held sufficient to give this court jurisdiction in personam over a corporation that it has property rights, however extensive, within the district, or that it has pecuniary interests, however valuable, in business managed and conducted by others. It must itself be carrying on business in its own right, on its own responsibility, and for its own account, and through or by means of its own agents, officers or representatives, in order to bring it within the operation of the laws of a State other than that in which it is incorporated, making it amenable to suits there, as a condition of its doing business in such State."

The case of Henning *vs.* Planters Ins. Co., 58 Fed., 440, 441, 444, is a decision by the United States Circuit Court for the Western District of Tennessee and follows St. Clair *vs.* Cox, supra, in holding that the averment of "doing

business" is jurisdictional and must appear affirmatively from the record itself." In that case suit was brought upon an Illinois judgment that failed to show the averment, and the court held the judgment inadmissible in evidence for that reason.

Moreover, under the statute of Colorado which authorizes service upon a foreign corporation, it is necessary for the records to show that the corporation was doing business in Colorado at the time of service. The only statute in Colorado that permits service upon a foreign corporation, through its agents, in any kind of an action, is Section 38 Mill's Annotated Code, subdivision ninth, which reads as follows:—

"A summons shall be served as follows:—

"NINTH. If the action be against a foreign corporation or joint stock company or association, organized under the laws of another State or territory *and doing business within this State*, the summons shall be served by delivering a copy to any agent of such corporation, company or association, *found within the county*, in which the action is brought, if no such agent be found in such county, then by delivering a copy of the summons to any stockholder who *may be found in the county*."

The phrase "and doing business within this State," in the above statute has been interpreted by the United States Circuit Court of Appeals for the Eighth Circuit in the case of Rust *vs.* Water Works Co. 70 Fed., 129. Rust was receiver for The American Water Works Company, a New Jersey corporation. Judgment had been obtained against the corporation in the United States Circuit Court for the District of Colorado, by the United Water Works Company, based upon service made in Denver upon one Venner, vice president of the American Water Works Company. Rust sought to have this judgment set aside upon the ground, among others, that The American Water Works Company was not doing business in Colorado at the time Venner was served. This was refused by the Circuit Court

but the Circuit Court of Appeals held, in construing Section 38. subdivision ninth, supra, that the judgment was void, for that reason, saying on pages 135 and 136:

* * * "The latter (meaning American Water Works Company) complied with the statute of Colorado relative to foreign corporations by filing with the proper authorities of that State its certificate of incorporation, a copy of the laws of New Jersey, under which it was incorporated. and a certificate that its principal place of business in Colorado would be at Denver, in that State. and that a certain resident of Colorado was designated as its agent to receive service of process for it."

And again on page 137:

"Moreover, the service of the summons in this section on C. H. Venner, the vice president and stockholder of The American Water Works Company, was insufficient to give the court below jurisdiction to enter judgment against it in a personal action. The statute under which this service was made reads (Sec. 38, subdivision 9, supra, quoted) but the record discloses the fact that The American Water Works Company was not at the time of the attempted service on Venner, and had not been doing business in Colorado for many months, *so that the authority to serve summons on this corporation was not given by this statute.*"

It was, however, held by the court below that the allegation that plaintiff in error was a foreign corporation "with its principal office in the State of Colorado in Ouray in said Ouray County" was sufficient to show the presence of plaintiff in error in the State. (Folio 153.) Undoubtedly if the allegation meant that plaintiff in error was actually maintaining a principal office at Ouray, the ruling of the court below would be correct, but if the allegation be read in the light of the returns of the officers and also in the light of Section 499 Mills' Annotated Statutes, a different construction, we submit, should be placed upon it. This statute reads as follows:

"Foreign corporations, shall, before they are authorized or permitted to do business in this State, make and file a

certificate signed by the president and secretary of such corporation, duly acknowledged, with the secretary of state and in the office of the recorder of deeds of the county in which such business is carried on, designating the principal place where the business of such corporation shall be carried on in this State and an authorized agent or agents in this State residing at its principal place of business, upon whom process may be served."

The allegation simply meant that the Cosmopolitan Mining Company had designated Ouray as the place of its principal office in compliance with Section 499 of Mills' Annotated Statutes, quoted above, and could have no other effect than to show that the defendant corporation had, at some time, complied, at least in part, with the requirements of the law permitting it to do business in the State. The return of the officer upon the writ of attachment in the Begole case shows that he was unable to find any one in Ouray County upon whom process might be served (Folio 75, p. 39); the records in the other cases show no attempt to make service in Ouray County, and the return of the sheriff of San Miguel County shows affirmatively that the party served as plaintiff in error's agent was not found or served within the county where it is alleged to have had its office. (Folios 110, 112, 123, 124, 136, 138, 150.)

These returns are hardly consistent with the idea that the defendant company was maintaining a principal office at Ouray at the time the sheriffs held the process papers, but if the allegation is read in the light of the statute it is perfectly consistent with the returns of the officers.

However, assuming that the allegation was sufficient to show, prima facie, that plaintiff in error was maintaining a principal office in Ouray, and that therefore the records were, so far as this point is concerned, admissible in evidence, then we submit that the uncontradicted testimony of the witnesses, William Story and Maurice Corbett, the sheriff of Ouray County, shows that, as a matter of fact, we had no office there. Mr. Story, who was Mr. Walsh's at-

torney in the suit to quiet title, testified that plaintiff in error had designated J. M. Jardine as its agent; that he never saw an office of plaintiff in error in Ouray County at any time, but that Mr. Jardine was its representative and that fact constituted what was known as the office of Cosmopolitan Mining Company. He further testified that in April, May and June, 1895, the time when these county court cases were brought, Mr. Jardine was not at Ouray but was employed in The First National Bank of Telluride of which he (Story) was president. (Folios 171, 172, 173, 174).

Maurice Corbett, the sheriff of Ouray County, at the time these actions were brought, testified that plaintiff in error had no office there and never had had an office there that he knew of. (Folio 178). We submit that this evidence, being uncontradicted, should have been sufficient to overcome the allegation that plaintiff in error was a foreign corporation with its principal office at Ouray, even conceding that the construction placed upon it by the court below was correct, and especially when the evidence is considered in connection with the returns of the officers.

If it was not deemed sufficient to support our motion for a direct verdict, it should, at least be sufficient to enable us to go to the jury and prevent a directed verdict against us, so far as these county court cases are concerned.

(*b.*) Plaintiff in error takes the position that the county court judgments were void for lack of jurisdiction and inadmissible in evidence for the further reason that it appears affirmatively from the records that summons was served in San Miguel County and not in Ouray County where the actions were brought. The original process of the courts in Colorado, does not run outside the county when the action is brought against a foreign corporation.

Section 38, Subdivision Ninth, of the Colorado Code, supra, provides that the summons may be served on any agent of a foreign corporation *found in the county where the suit is brought, and if* no agent can be *found in the*

county, then it may be served upon any stockholder *found in such county.*

We think that in connection with this code provision the court's attention should be called again to the following language in Section 499 Mills' Ann. Stats., viz:

"Foreign corporations shall * * * make and file a certificate * * * designating the principal place where the business of such corporation shall be carried on in this State and an authorized agent or agents in this State *residing at its principal place of business upon whom process may be served.*"

From these statutes it is manifest that the legislature of Colorado was not wholly unmindful of its obligations to provide for the giving of reasonable notice to foreign corporations of actions commenced against them, and that, in its wisdom, it thought such reasonable notice would be given by requiring that, in the case of a statutory agent the suit should be instituted and the process served in the county where the principal business of the corporation was carried on in the State, and that, in the case of another agent, the suit should be instituted and the process served in the county of the residence of such other agent.

Mills' Ann. Code, Sec. 38, Subdivision Ninth, supra, is mandatory; it requires the service to be made upon an agent "found in the county," or if no agent is "found in the county" then upon a stockholder "found in the county" thus using the expression "found in the county" in three different places.

There would be no question that our contention is right if it were not for Section 38b of the Colorado Code, which reads as follows, viz:

"Sec. 38b. All acts or parts of acts inconsistent with the provisions of this act are hereby repealed; but nothing herein contained shall be held to repeal any provision of law, now in force which authorizes or permits a summons to be served in any other county of the State; than that in which the action is brought." (L. '91, p. 83, Sec. 3, Amending Code 1887, Sec. 38.)

We submit, however, that if Section 38b, supra, be read in the light of the laws of Colorado upon the subject of the service of process, that it will plainly appear that it it was not intended to apply to Section 38, paragraph ninth of the Code, supra. It was enacted contemporaneously with Section 38, and if held to apply thereto, would contradict it in practically the only change made by Section 38 in the law as it existed prior to the enactment thereof.

Mills' Ann. Code, Section 38, supra, was enacted by Session Laws of 1891, pages 81–83, and it amended Section 38 of the Code of 1887, Session Laws of 1887, pages 106–7. The provision of the statute amended corresponding to the provisions of the statute under consideration were:

"Section 38. A summons shall be served except as otherwise provided by law as follows: * * * If the suit be against a foreign corporation * * * service shall be made by delivering a copy of the writ to an *agent*, cashier, treasurer or secretary thereof; in the absence of such *agent*, cashier, treasurer or secretary, to any stockholder."

Both the old law and the new law permitted and permit, that service might or may be made upon any *agent* of the corporation, the old law permitted the service to be made upon such *agent* if he were found in the State, and the new law permits the service to be made upon such agent only if found in the county. The old law permitted service to be made upon a stockholder found in the State only in case an agent could not be found in the State, and the new law permits service to be made upon a stockholder only in case the stockholder is found in the county of the action and no agent is found in the county of the action.

When the old law and the new law are thus compared it becomes apparent that the change, and the only change, which the legislature of Colorado sought to effect, in enacting the new law, was to limit the former power of the courts to issue their process to any county in the State, and

to require that such process should be issued to, and be served in, the county in which the action was brought and in no other county.

The law enacting the present Code of Colorado has the following title:

"AN ACT

(For an act) to provide a code of procedure in civil actions for courts of record in the State of Colorado, and to repeal all acts inconsistent therewith." Mills' Ann. Code page 1.

While the code thus provides a code of procedure for all civil actions in courts of record of the State, nevertheless, the following important topics are within the jurisdiction of such court and are not mentioned by the code, but are the subject-matters of other statutory provisions, viz: Eminent domain, Mills' Ann. Stat., Chap. 45; forcible entry and unlawful detainer, Ibid, chap. 53; irrigation and the adjudication of priorities of water rights. Ibid, chap. 69; partition, Ibid, chap. 94; appointment of guardians and the administration and sale of the real and personal estate of minors, Ibid, chap. 59; appointment of conservators and administration and sale of the real and personal estate of insane persons, Ibid, chap. 80; probate of wills and the administration and sale of the estates of deceased persons, Ibid, chap. 131; divorce and alimony, Session Laws of 1893, chap. 80.

The special laws on all these different topics provided for the service of summons, citations and other process in a manner differing from the manner in which Section 38 of the Code of 1887 provided for the service of summons in ordinary civil cases, and it was this different manner of service to which the legislature of 1887 referred in the exception "except as otherwise provided by law," to be found in Section 38b of the Code of that year.

The special laws on all these different topics now provide for service of summons, citations and other process, in a

manner differing from the manner in which Section 38 of the Session Laws of 1891 provides for the service of summons in ordinary civil cases, and they also provide for service of summons, citation and other process in such cases in other counties than the county in which the action was brought. It was, therefore, the purpose, and the only purpose, of the legislature of 1891 in enacting the saving clause to the present law, viz: Mills' Ann. Code, Sec. 38b, supra, to provide that the special laws on these different topics should not be held to be repealed in so far as they provide for the service of summons, citation and other process, in other counties than the county of the action, although, under like circumstances, a summons in an ordinary civil action could not be served in such other county.

To give the saving clause of the present law any different meaning or to construe it as in any manner affecting the provisions of Subdivision Ninth, which requires service to be made in the county of the action, would nullify the only purpose sought to be accomplished by the legislature of 1891 in enacting that subdivision, and such a construction of this saving clause would make it repugnant to, and inconsistent with, an express and positive provision of the act.

The construction we contend for has been put upon Section 38, Subdivision Ninth, by the Court of Appeals of the State of Colorado in the case of

Venner *vs.* the A. U. W. Co., 15 Colo. App., 495, 499, 504, 505, 506.

In this case the process was served in the county of the action, but the defect in the return of the sheriff was, that it did not show that the process was served upon an agent of the corporation found in the county, or that no such agent of the corporation was to be found in the county and, that therefore it was served upon a stockholder of the corporation found in the county, and because of this defect

the judgment was held to be void for want of jurisdiction in the trial court over the person of the defendant.

The court had under consideration a judgment rendered in pursuance of service shown by the following return:

"By delivering a copy thereof to Clarence H. Venner, vice president of The American Water Works Company, at Denver, in the county aforesaid, on November 5, 1892." P. 499.

After calling attention to the provisions of the statutes of the State, in regard to the designating of the statutory agents, and to the Subdivision Ninth of Section 38 of the Code, the court says:

"The American Water Works Company was a foreign corporation doing business in this State. It was organized under the laws of New Jersey. Service of summons could, therefore, be made upon it only by the delivery of a copy of the writ to an agent of the corporation *found in the county of the suit*, or to a stockholder *in that county*, if such agent could *not be found*. In this case as shown by the return, the service was made upon Venner, not as a stockholder but as vice president, and the return did not show that no agent of the corporation could be found in Arapahoe County. It is only in the event that no agent is found in the county that service may be had upon a stockholder. * * * Venner may or may not have been a stockholder * * * but if the service had been upon Venner as a stockholder the court would still have had no jurisdiction of The American Water Works Company, there could be no service upon a stockholder, except upon a failure to find an agent *in the county*. In a suit against a foreign corporation, service *must* be made upon it by delivering a copy of the summons to its agent *found within the county where the action is brought;* and it is only in case such agent is not found within the county that substituted service is valid. Service upon a stockholder, unless there is a failure to find the agent, is a nullity. The return of service is not aided by presumption. And, to give the court jurisdiction where the service is had upon a stockholder, the return must show that no agent of the corporation could be found within the county. * * * For

aught that it indicates, the proper agent of the company may readily have been found in the county * * * jurisdiction of the person of a defendant, if there is no appearance by him, depends upon the service of the summons and the fact and manner of the service must be stated in the return. It appears from the return that there was no legal service of summons upon the American Water Works Company, it also appears from the record that no appearance to the action was made by that company; hence it was not within the jurisdiction of the court, and the judgment was, as to it, a nullity." pp. 504, 505, 506.

If there had been any occasion for construing the plain terms of this provision of the Colorado Code in reference to service upon foreign corporations the above decision has construed that provision to mean, that the service whether upon an agent or upon a stockholder of the corporation must be made in the county in which the action is brought, that the return of the officer must show either, that the process was served upon an agent of the corporation found in such county, or that no such agent could be found in such county and the service was therefore upon a stockholder of the corporation found in such county, and that where the return fails to show such a service the trial court acquires no jurisdiction over the person of the defendant, and its judgment is a nullity. The court will note that the records under consideration fail to show any attempt to serve summons in Ouray County, or that the sheriff of Ouray County ever had a summons in his hands.

This decision ought to establish the invalidity of all the county court cases for the reason that, while the Court of Appeals is not the highest court in the State, nevertheless, it is a court having an appellate jurisdiction which is not only extensive but which is in most cases exclusive of the Supreme Court itself, and for the further reason that the decision shows great care, thought and learning.

The jurisdiction of the Colorado Court of Appeals is set out in Section 406d, Mills' Ann. Code, which reads as follows:

"Sec. 406d. The Court of Appeals shall have jurisdiction:

First. To review the final judgments of inferior courts of record in all civil cases and in all criminal cases not capital.

Second. It shall have final jurisdiction, subject to the limitations stated in subdivision three of this section, where the judgment, or in replevin the value found is two thousand five hundred dollars or less, exclusive of costs.

Third. It shall have jurisdiction not final in cases where the controversy involves a franchise or freehold, or where the construction of a provision of the constitution of the State or of the United States is necessary to the decision of the case; also, in criminal cases, or upon writs of error to the judgments of county courts. Writs of error from or appeals to the Court of Appeals shall lie to review final judgments within the same time and in the same manner as is now or may hereafter be provided by law for such review by the Supreme Court." (L. '91, pages 119-20, Sec. 4).

Service of process outside of the county where the process of the particular court "runs" is not a mere irregularity, but a fatal defect, which prevents the court from acquiring jurisdiction and a defect therefore of which advantage may be taken, not only upon a motion to quash the service or upon appeal or error to reverse the judgment, but also in any subsequent action in which the plaintiff seeks to use or to justify under his judgment, for here, according to the law of the State, the process of that court has no force or effect and is entitled to no respect, as, according to interstate and international law, it would have no force or effect and would be entitled to no respect if served in a foreign State or country.

There is a special reason for strictly enforcing this rule in a case, like the present one, where the court which rendered the judgments in question would have no jurisdiction over the defendant at the common law, and where the validity of its judgment depends, therefore, upon the statute and a compliance with the terms of the statute.

In the case of Mason's Frat. Ass'n *vs.* Riley, 60 Ark., 578, service was made upon a foreign insurance company by serving the Auditor of the State in another county than that of the suit, while the Statute of Arkansas provided that suit must be brought in the county where the defendant resided or was served, and the court held the judgment rendered by default void for lack of jurisdiction, saying, on page 581:

"The appellant was a foreign insurance company having no residence or agent in Jefferson County and was summoned in Pulaski County to appear in the Jefferson County Circuit Court. By the service of the summons in this case upon the auditor in Pulaski County requiring appellant to answer in the Circuit Court in Jefferson County, that court acquired no jurisdiction of said appellant and for want of such jurisdiction the judgment by default is void."

See also Auditor *vs.* Davies, 4 Ark., 494, 503.
Ford *vs.* Adams, 54 Ark., 137, 139, 140.
S. B. & L. Ass'n *vs.* Hallum, 59 Ark., 583, 586, 587.

The case of Sanchez *vs.* Haynes, 35 Fla., 619, was that of a service made upon the defendant outside of the county of the suit, where the record did not disclose that the suit affected property, or was based upon a cause of action which accrued in the county where the suit was brought; the Statute in Florida, in all other cases requiring the suit to be brought where the defendant resided or was served. The Supreme Court of Florida held the judgment void, saying, on page 625:

"Under the circumstances there was no authority for the bringing of such suit in St. John's County, and no right accrued to the plaintiff under said act of 1887 to send his process out from that county and to have it served upon the sole defendant in another county. The service made upon the defendant under these circumstances was a nullity, and the Circuit Court of St. John's County did not thereby acquire jurisdiction over the person of the defendant so as to authorize the entry of either a default or final judgment against him."

In the case of Christian *vs.* Miller, 111 Mo., 429, there were two defendants who were residents of Randolph County. The plantiff resided in the City and County of St Louis, brought the suit there and served one of the defendants there. The other defendant was served in Randolph County, but the court held that, in the absence of statutory authority allowing this latter service, the court acquired no jurisdiction over the second defendant, saying on page 436:

"It will readily be seen from these provisions that where a defendant is "found" in a county where a plaintiff resides, and is thereupon served with process, that there exists no statutory authority for the issuance of another writ to the county of the defendant's residence for service upon another defendant in the same action. It results from this ~~action~~ of statutory authority that the service of process on Davis, conferred no jurisdiction on the Circuit Court of the City of St. Louis over the person of that defendant."

See also U. S. M. A. Ins. Co., *vs.* Reisinger, 43 Mo. App., 571, 576.

The authorities holding that, where a service is made outside the county where the suit is brought, either contrary to the statute, or without statutory authority, the service is void and leaves the court without jurisdiction, are numerous and unanimous.

Slatton *vs.* Johnson, 4 Hayes (Tenn.), 197, 198.
Brown *vs.* Bridge Co., 23 Ore., 7, 8.
Walker *vs.* Stevens, 52 Neb., 653, 655.
Bowen *vs.* School Dist., 10 Neb., 265, 268.
Leake *vs.* Gallogly, 34 Neb., 857, 858.
Green *vs.* Oneida Co., Pleas., 10 Wend., 592, 593.
Conor *vs.* Hilton, 66 Howard Pr., 144, 146.
Dennison *vs.* Smith, 33 Mich., 154, 157-8.
Hartford Ins. Co., *vs.* Owen, 30 Mich., 440, 444.
Hebel *vs.* Amazon Ins. Co., 33 Mich., 400, 407.
Allison *vs.* Circuit Judge, 104 Mich., 140, 142, 145-7.
Ruby *vs.* Grace, 63 Ky. (2 Div.), 540, 541-2.
Dyas *vs.* Lindsay, 67 Ky., 340, 350, 352.
Commissioner *vs.* Rush (Kan.), 24 Pac., 484-6.
Wells *vs.* Patton, 50 Kan., 732, 736.

If our position upon this point is correct, then these judgments were void for lack of jurisdiction over the plaintiff in error, and inadmissible in evidence, even assuming that plaintiff in error had an office at Ouray and that J. M. Jardine was its agent.

(*c*) Plaintiff in error contends that these County Court judgments were void for lack of jurisdiction and therefore inadmissible in evidence, for still another cause, and that is for the reason that the records fail to show that J. M. Jardine, upon whom process was served, was an agent of such a character as to authorize service upon him.

Section 38, Paragraph Nine of the Colorado Code, supra, provides that process may be served "on any agent of a foreign corporation." The returns of the officer in all of these attachment cases, show that process was served upon "J. M. Jardine, the duly authorized agent" of plaintiff in error.

It will be seen that the return of the officer shows service upon an agent of some kind. If, therefore, the expression "any agent" in the statute is to be understood and enforced literally, our position upon this point must be wrong.

If, on the other hand, notwithstanding the peculiarities of the Colorado statute, the agent upon whom process is served must represent his principal in such a way that notice to the agent is to be deemed "due notice" to his principal and if this fact must appear affirmatively from the record, these requirements are not satisfied by the statement of the sheriff that J. M. Jardine was the "duly authorized agent" of the defendant, this statement being a mere legal conclusion and constituting the opinion of a ministerial officer upon a number of intricate questions of law.

Hence if Mills' Ann. Code, Section 38, subdivision ninth, were to be taken in its literal sense, process might be served upon any person answering the description of the agent of the corporation, no matter what might be

the domicile or the character of the duties of such agent, it might be served upon an agent whose domicile was, and whose duties were, to be performed in another State, and who happened to be served while in the State of Colorado, not on any business of the corporation, but for purposes of his own, or upon some business wholly unconnected with the corporation.

Hence, also, if this subdivision could be so understood, process might be served upon an inferior agent or upon an employe of the corporation, and the corporation which had been organized in another State, but which was doing business and had made large investments in the State of Colorado, might be subjected to a judgment in one of the State or Federal Courts, which would force it into bankruptcy or deprive it of the right to prosecute its business in the State, where the only service of process was made upon one of the caretakers or custodians of its property, or upon some other inferior or temporary agent not having charge of its business, and a judgment rendered in pursuance of such service would be as valid as if rendered in pursuance of service of process upon its designated statutory agent or upon one of its officers or superior agents.

The objectionable feature of this statute, viz., permitting service upon any kind of an agent, or even upon a stockholder, is so inconsistent with the universal principles of natural justice and international and interstate law, which provide for "due notice" before condemnation, that they render the whole statute void, or void pro tanto, in so far as this objectionable feature appears, because in contravention of the Fourteenth Amendment to the Federal Constitution.

Lafayette *vs.* French, 18 How. 404, 407.

St. Clair *vs.* Cox, 106 U. S., 350, 359, supra.

Goldy *vs.* Morning News, 156 U. S. 521, 525, supra.

C. M. L. Ins. Co. *vs.* Spratley, 172 U. S. 6, 9' 10, supra.

Conley vs. Mathieson Alkali Works, 190 U. S. 406, 411, supra.

Geer *vs.* Mathieson Alkali Works, 190 U. S. 428, 432, supra.

Four conditions must co-exist as matters of fact, in order to warrant a judgment in personam against a foreign corporation which is based upon the alleged default of the corporation:

First. There must be a constitutional State statute authorizing the judgment in personam.

Second. There must be a substantial compliance with the repuirements of the State statute when read in connection with the State and Federal constitutions.

Third. The corporation must have been doing business in the State at the time of the service of process, and

Fourth. The agent upon whom the process was served must have been an agent of such a character as to be presumed to have been authorized by the corporation to receive such service.

No one will contend that such a judgment would be valid if any one or more of the above-mentioned conditions did not exist as a matter of fact, and the non-existence of such condition or conditions in any way appeared when the judgment was offered in evidence in a subsequent action. The question, therefore, arises whether all or any one or more of such conditions must appear affirmatively, and, if so, how such condition or conditions must appear in such subsequent action.

It is unnecessary that the statute should appear from the record of the judgment, or otherwise be made to appear in the evidence, for such a statute is a public law of which, not only the State Courts, but also the Federal Courts in the State and this Court, when called upon to review the decisions of such State and Federal Courts, will take judicial cognizance.

This Court has held, in St. Clair *vs.* Cox, supra, that, in order to entitle such a judgment to be admitted in evidence in a subsequent action, the third of the above-mentioned

conditions, viz., that of "doing business," must appear affirmatively somewhere in the record of such judgment.

We submit that it has been shown that a personal action against a foreign corporation is statutory, and in derogation of the common law, and that, therefore, the facts constituting the jurisdiction must appear affirmatively from the record, and there is not an argument which can be advanced in support of the necessity of the rule in St. Clair *vs.* Cox, supra, requiring that there should appear in the record of such judgment one essential jurisdictional element, viz., the doing of business by the corporation in the State at the time of the service of the process, which cannot be advanced in support of the necessity that there should appear in such record the two other essential jurisdictional elements, viz., a substantial compliance with the requirements of the State statute when read in connection with the State and Federal constitutions, and authority from the corporation to the agent upon whom process is served to receive such service.

This question was presented by the record in St. Clair *vs.* Cox, supra, but it was not suggested by counsel or passed upon by this Court in that case, and it is believed that the question has never been presented to this Court for decision or decided by this Court in any other case.

This precise question has, however, been presented to and decided by quite a number of other courts, both State and Federal, and, as will be seen from the authorities next cited, these courts have all held that, in order to entitle such a judgment to be admitted in evidence in a subsequent action, process must be served upon the agent provided for by the statute, and such fact must appear from the record.

It is true that the statutes considered by the courts in the following cases differ from the Colorado statute in the respect that they provide that the service of process shall be made upon certain specified agents, while the Colorado statute provides, generally, that service be made upon "any agent" of the corporation "found in the county in which the action is brought," but if the Colorado statute is not

wholly unconstitutional and void, it is because it is to be read in connection with the Federal and State constitutions in regard to due process of law. The requirements, therefore, of these constitutional provisions, that the service be had upon a designated statutory agent of the corporation or upon some other agent, the character of whose agency is sufficient to warrant the inference that the notice to him is "due notice" to the corporation, must be considered as forming as much a part of the statute as if this language or language of similar import had actually appeared in the statute itself by the express enactment of the Legislature of the State.

In the case of Kienfke *vs.* The M. D. T. Co., 11 Fed., 282, the return failed to show that the person served was an agent in charge of an office or place of business of the defendant (a foreign corporation), as was required by statute. In sustaining a motion to quash the return, the United States Circuit Court for the Eastern District of Missouri says, on page 283 :

"The officer's return was: 'I return on this writ that I have served the same on the within named M. D. T. Co., a corporation, by delivering a copy of this writ to * * *, an agent of the aforesaid corporation * * * at said company's office, in St. Louis, in the above district, on March 4, 1882, * * *.'

"The return fails to state that the alleged agent of the defendant, a foreign or non-resident corporation, was an agent in charge of an office or place of business of defendant * * * the return being defective in that respect, the motion to quash is well taken."

In the case of the U. P. Ray Co. *vs.* Pillsbury, 29 Kansas, 652, Pillsbury had obtained judgment against the railway company, by default, where the return of the officers showed that service had been made upon an agent, without disclosing the character of his agency. The case was taken upon error to the Supreme Court, and, in holding the judgment invalid, Justice Brewer says, on page 653 :

"Two errors are alleged: First, that the record shows no service, and second * * *, both points, we think, are well taken. The return of the summons shows that it was served by delivering a copy thereof on D. W. March, agent of said U. P. R. R. Co., Manhattan, Kansas, where this was served, or what kind of an agent of said defendant the said D. W. March was, is not shown. Such service is insufficient * * * for aught that appears said March may have been an agent to purchase coal or to transact any temporary business on behalf of the company, with no office or residence in the county. The sections above referred to provide ample and easy means for service upon a railroad corporation, and before it can be adjudged in default, and subjected to a judgment upon default, *the record must affirmatively show* that, in some of the ways named in the statute, service has been made upon it."

The facts in the case of Kirby Carpenter Co. *vs.* Trombly, 101 Mich., 447, were as follows: The plaintiff was an Illinois corporation and replevied certain goods that had been levied upon by virtue of a judgment rendered by a Justice of the Peace against the plaintiff as garnishee. The validity of the judgment rendered by the Justice was attacked upon the ground that the return of the officer in that case gave the Justice no jurisdiction. In sustaining the action of replevin, on page 449, the court says :

"The return of the officer shows a service upon the defendant foreign corporation by delivering to Andy L. Robbins, the agent of said Kirby Carpenter Company, having charge of its affairs within said County of Iron, a copy thereof.* *It is true that the return in the present case shows that the agent Robbins had charge of the affairs of the company within said County of Iron, but it does not appear what was the nature of the affairs of the company within the county. For aught that appears the agent may have been a mere custodian of property without authority to control the affairs of the corporation in the matter of making contracts in the county. If the return had stated that the corporation was conducting business in the within county, and that such business was within the charge and control of the agent, it would doubtless have been sufficient. We think the Circuit

Judge was right in holding that the return was not sufficient to confer jurisdiction."

The following cases are also cited as sustaining the same doctrine:

"C. P. M. Co. *vs.* Bank, 86 Ill. 587, 589.
S. B. L. Ass'n *vs.* Hallum, 59 Ark. 583, 587.
Ill. & Miss. Tel. Co. *vs.* Kennedy, 24 Ill. 319.
Dickerson *vs.* B. & M. R. R. Co. 43 Kas. 702, 703.
Toledo Ice Co. *vs.* Munger (Mich.) 82 N. W. 663, 664.
Haley *vs.* H. & St. J. R. R. Co. 80 Mo. 112, 113, 114.

The rule announced in these cases excludes the idea that the character of the agent who is served with process can be shown otherwise than by the record, and for aught that appears in these County Court cases, Jardine may, to use the language of Mr. Justice Brewer, in U. P. Ry. Co. *vs.* Pillsbury, *supra*, "have been an agent to purchase coal or transact any temporory business on behalf of the company."

If our contention on this point is correct, these records should not have been admitted in evidence even if it be assumed that plaintiff in error had an office in Ouray; that Jardine was, in fact, its agent and that the service in San Miguel County instead of Ouray County was valid.

The defendant in error was, however, allowed to supplement the records, by introducing over our objection, copies of a resolution of plaintiff in error, by which J. M. Jardine was, some ten years before the bringing of the County Court cases, designated its process agent. These copies were certified by the Clerk and Recorder of Ouray County and by the Secretary of State of the State of Colorado. (Folios 64 to 67.)

The certificates were admitted provisionally with leave for plaintiff in error to renew its objection after defendant in error had introduced his evidence. The objection was not renewed because the court below had held that the authority of the agent would be presumed if the corporation

was present in the State and that the records were sufficient to show its presence. (Folio 97.)

That it was error in the court below to admit the certificates, we submit the following authorities will show:

The case of Montgomery *vs.* Merrill, 36 Mich. 97, 102, 104, appears to be directly in point.

This case was before the Supreme Court of Michigan on two former occasions as will be seen from 18 Mich. 338 and 25 Mich. 73.

On the last preceding occasion the record of a judgment against a domestic corporation was rejected, for the reason that the return of the officer did not state positively the facts that showed that the alleged agent of the corporation was an agent authorized under the statute to receive service of process, but stated the facts on information and belief, and without giving the grounds of such information and belief. 25 Mich. at 77.

The party relying upon the judgment had the return amended in an *exparte* proceeding and offered the amended return in the case reported in 36 Mich. The record was refused admission on the ground that the amendment had been unwarranted and, thereupon, the party relying upon the judgment, offered to prove by parol, the character of the agent upon whom service was had and was not permitted so to do. (See Page 102.)

In referring to this offer Mr. Chief Justice Cooley says, on page 103, of 36 Mich.:

"We think, also, that the Court was right in rejecting the evidence offered by the plaintiff in the trial to show that Sidney Ketcham was in fact the last President of the Bank. Jurisdictional facts cannot rest in parol, to be proved in one case and disproved, perhaps, in another. The record must be complete in itself."

On this point we cite Henning *vs.* Planters Ins. Co., 23 Fed. 442, supra.

The following cases are also cited in support of the general proposition, that records must prove themselves and

cannot be supplemented or modified by extrinsic evidence :

Cissel *vs.* Pulaski County, 10 Fed. 891, 893.

Rutherford *vs.* Crawford, 53 Ga. 43.

Holmes *vs.* Cole, 95 Mich. 272, 273.

Sullivan *vs.* Blackwell, 28 Miss. 737, 743.

Madison Bank *vs.* Sumanon, 79 Mo. 527, 531.

Anderson *vs.* Binford, 61 Tenn. (2 J. Baxter) 310, 314, 315.

2. Hitherto these judgments have been considered as in personam. Conceding, for the sake of the argument, that because writs of attachment were sued out in these cases, they were actions in rem, or quasi in rem, plaintiff in error still contends that the County Court of Ouray County was without jurisdiction to render a judgment therein or to condemn its property to be sold.

(*a*) The records show that no service of process was made upon the plaintiff in error in accordance with any statute of Colorado. If the service was made under Section 38, Subdivision Nine of the Code, supra, then the corporation must have been doing business in the State and the agent must be found in the county of the action whether the action be in personam or in rem. If the corporation is not doing business in the State, or if the agent cannot be found in the county, then service can be made by publication, as provided by Section 41 of Mills' Annotated Code, which, so far as pertinent, reads as follows :

"Sec. 41. Service by publication shall be allowed only after summons issued and return thereon made that the defendant, after diligent search, cannot be found. After such return, not less than ten days after issue of summons, publication shall be made by order of the clerk of the proper court, but shall be made only in cases of attachment, foreclosure, claims and delivery, or other proceedings where specific property is to be affected, or the procedure is such as is known as a proceeding in rem. After return is made as aforesaid, the case being such as hereinbefore mentioned, the plaintiff, or one of the plaintiffs, may file in the office of the proper clerk an affidavit stating that the defendant re-

sides out of the State, or has departed from the State without the intention of returning, or concealed himself to avoid the service of process, and giving his postoffice address, if known, or stating his postoffice address is not known to affiant, whereupon the order of publication shall be made by the clerk. The order shall direct the publication to be made in a public newspaper published in the county. Such publication shall be made at least once a week for four successive weeks. When the affidavit gives the postoffice address of the defendant, the clerk shall mail a copy of the summons, duly stamped, to the defendant, at such address forthwith. The service shall be completed at the expiration of ten days from the date of the last publication."

The records of these cases do not show that plaintiff in error was doing business in the State, and they do show that service was made upon its alleged agent outside the county of the action, and, in the Begole case, that no person could be found in the county of the action upon whom process could be served. In other words, they disclose a void personal service. It may, perhaps, be urged that where a court of superior jurisdiction, has jurisdiction over the *res*, and proceeds to condemn and sell the property, it will, in the silence of the record, be presumed to have acted in accordance with its authority so far as the *res* is concerned. This may be true when the record is silent, but where one kind of service is disclosed no other will be presumed.

The case of Galpin *vs.* Page, 18 Wallace, 350, is a leading one upon this point and in passing upon the question of the presumptions to be indulged in favor of a judgment rendered in the District Court of the City and County of San Francisco, upon which the defendant relied, and which judgment was alleged to be void for lack of proper service, this court says on page 366:

"Presumptions are only indulged in to supply the absence of evidence or averments respecting the facts presumed, they have no place for consideration when the evidence is disclosed or the averment is made. When therefore the record states or makes an averment with reference to a jurisdictional fact, it will be understood to speak the truth

on that point and it will not be presumed, that there was other or different evidence respecting the fact or that the fact was otherwise than as averred. If, for example, it appears from the return of the officer or the proof of service contained in the record that the summons was served in a particular place and there is no averment of another service, it will not be presumed that the service was made at another and different place, or if it appear in like manner that the service was upon a person other than the defendant, it will not be presumed, in the silence of the record, that it was made upon the defendant also. Were not this so it would never be possible to attack the judgment of a superior court collateraliy although the want of jurisdiction might be apparent upon its face—the answer to the attack would always be that notwithstanding the evidence, averments and necessary facts to support the judgment are presumed."

To the same effect are the following cases:

Godfrey *vs.* Valentine, 39 Minn. 336, 337.
Israel *vs.* Arthur, 7 Colo. 5, 8.
Settlemier *vs.* Sullivan, 97 U. S. 444, 449.
Newman *vs.* Crowls, 60 Fed. Rep. 220, 224.

Hence when the records show this void service under Section 38 Subdivision Ninth of the Code, it cannot be presumed that proper service was also made under Section 41 of the Code, supra, and in this vital respect the case at bar differs from the case of Cooper *vs.* Reynolds, 10 Wallace 309, which will be discussed in the next subdivision of the argument.

(*b*) In Colorado the Court does not acquire jurisdiction to render a judgment or to condemn and sell property by the mere levy of the writ of attachment. There must also be a valid service of summons and writ of attachment on the defendant.

We are aware of the fact that this Court has held, in the case of Cooper *vs.* Reynolds, 10 Wall. 309, supra, that, under the laws of Tennessee, the Court obtains jurisdiction over the property by its seizure in attachment, and even though the record fails to disclose a proper service of the

summons upon the defendant, the judgment will be sustained as a judgment in rem. It is true that the record in that case contained a finding by the Court that there had been due service of the notice in attachment upon the defendant by publication, but plaintiff in error understands the effect of the decision of this Court in that case to be that jurisdiction to render a judgment against the property was obtained by the levy of the attachment, even though it did not appear that the defendant had been served. This, however, is not the law in Colorado.

The statutes of that State prescribe, that, when real estate is attached, a copy of the writ of attachment must be filed with the clerk and recorder of the county where the real estate is situate, *and a copy of the writ must be served upon the defendant.*

Paragraph first of Section 104 of the Code reads as follows :

"First. Real property standing upon the records of the county in the name of the defendant, shall be attached by filing a copy of the writ together with a description of the property attached, with the recorder of the county."

Section 97 of the Code, so far as pertinent, reads as follows :

"The writ shall be directed to the sheriff of any county in which the property of such defendant may be *and require him to serve a copy of the writ on the defendant* and to attach and safely keep all of the property of such defendant within his county * * *"

Section 96 of the Code, in so far as it relates to the matter of service of process, reads as follows :

"The defendant *after the service of the writ of the attachment upon him or after he has due notice thereof, as hereinafter provided,* his agent or attorney, at any time within the time prescribed for answering, may, by affidavit, traverse and put in issue the matters alleged in the affidavit upon which the attachment is based. * * *"

"If the defendant fail to traverse the plaintiff's affidavit, the attachment shall be deemed sustained; but it shall not be

necessary to have an actual return of the writ before resorting to service by publication or to personal service out of the State, provided the other requisites of constructive service are complied with; the defendant shall also be deemed to have *due notice* of the attachment when he enters a general appearance, or shall be *personally or constructively served, as provided by this act.*"

From Mills' Ann. Code, Sec. 38, Sub. 9, and from the Code sections above mentioned it appears:

First. That the plaintiff is required to serve a writ of summons upon the defendant in order to advise the defendant of the fact that a suit has been instituted against him, and that there must be a valid personal, substituted or constructive service of this writ upon the defendant, in order to give the court jurisdiction to render a judgment in any kind of action.

Second. That where there is a personal service of the writ of summons, the plaintiff is required to serve a copy of the writ of attachment, not for the purpose of advising the defendant, that an action has been commenced against him, but for the purpose of advising him, that, in the action thus commenced against him, the plaintiff prays for an attachment of his property and thus enabling him to contest the right of the plaintiff to such attachment, whether he has, or has not, any grounds upon which to contest the right of the plaintiff to a judgment in the action.

Third. That there is no necessity for the service of the writ of attachment upon the defendant, where there is a service by publication of the writ of summons, and,

Fourth. That the purpose of the levy of the writ of attachment is not to give the court jurisdiction to render a judgment in the action, but to subject the property thus attached to a special execution in case such judgment is rendered and the attachment is sustained.

Not only do the statutes of Colorado require the service of process, but the Supreme Court of Colorado has held that the courts of that State have no jurisdiction to condemn and

sell property in attachment proceedings unless there is a valid service upon the defendant. We refer to the case of Great West Mining Company *vs.* Woodmas, of Alston Mining Company, 12 Colo. 46. The action was brought by the plaintiff to set aside sheriff's deeds, which had been made pursuant to two judgments rendered in attachment cases. One of the judgments was rendered by default on service made on one Purmort as the agent of the Great West Mining Company, and the other was rendered on like service and an appearance by one Gunyan, who assumed to act as its attorney. The Supreme Court of Colorado held the service bad; that notwithstanding the attachments the court had no jurisdiction to condemn and sell the property and that the sheriff's deeds were therefore void, saying, on pages 53 and 54:

"It was competent to show that the service of the writ and summons was not made upon a general agent of the defendant and that the entry of appearance by the attorney was unauthorized, and that no notice was given to the parties whose right was sought to be affected by such entry. It follows as a logical result of the propositions before discussed that a judgment rendered without service, or upon the unauthorized appearance of an attorney, is (whenever it is made to appear by proper proceedings instituted for this purpose), void, and that all sales, or other proceedings had thereunder are, as to all persons, irrespective of notice, or bona fides, absolutely nullities."

* * * "But absence of local service or authorized appearance is jurisdictional. Without jurisdiction, no judgment whatever will be entered nor rights acquired thereunder."

"The mere levy of an attachment did not give the Court jurisdiction to determine the question of indebtedness and condemn the attached property to pay the same."

And in referring to due process of law and the State and Federal constitutional provisions in regard to the same, the Court says, on page 55:

"The courts have uniformly held that this requirement demands that there shall be notice and hearing before con-

demnation. Any proceeding which violates these principles is not 'due process of law,' and is not according 'to the law of the land.'"

"Where the property of a citizen is taken and condemned without notice to him, it is entirely immaterial whether it be a special or general judgment, the fundamental wrong in such case being that his property is taken and conveyed to some other person without his knowledge."

Upon the petition for rehearing, the Court restates all of the foregoing propositions of law, page 56, and says: "And whatever rule may obtain in other localities upon the question of acquiring jurisdiction solely by the levy of the writ of attachment, we are of the opinion that, under our statute, there must be further notice and opportunity given for a hearing before condemnation." (Page 57.)

We refer also to the case of

Thomson *vs.* White, 25 Colo. 226, 230, 231, 233.

In this case there was service of summons and levy of the writ of attachment upon real property, but the provisions of the Code, Sections 97 and 104, requiring the service of a copy of the writ upon the defendant was not complied with. (Page 230.)

The Court quotes with approval from the 12 Colo. 46, and 12 Colo. 108, to the effect that the mere levy of the writ of attachment does not give the Court jurisdiction to determine the question of indebtedness and condemn the attached property to be sold, but that there must also be a proper service of the writ of summons and the writ of attachment (page 231). And the Court holds that in case of the want of service of the writ of attachment judgment must be reversed. (253.)

We understand that the Federal Courts will adopt the rule of construction which has been placed upon a statute by the Supreme Court of the State which has enacted the statute, but that this practice will not prevent the Federal Courts from holding that a statute enacted by a State, or the construction put upon such a statute by the courts of that

State, contravenes the Federal Constitution or the principles of natural justice or international law.

Nesmith *vs.* Sheldon, 7 How. 812, 817.
Bergman *vs.* Bly, 66 Fed. 40, 43.
Cheeley *vs.* Clayton, 110 U. S. 701, 707, 708.
Bucher *vs.* R. R. Co., 125 U. S. 555, 582, 583.
Detroit *vs.* Osborn, 135 U. S. 492, 498, 499.
Lumber Co. *vs.* Ott, 142 U. S. 622, 627, 628.
Bauserman *vs.* Blunt, 147 U. S. 647, 655.
May *vs.* Temny, 148 U. S. 60, 64.
Balkam *vs.* Iron Co., 154 U. S. 177, 188, 189.
Forsyth *vs.* Hammond, 166 U. S. 506, 518, 519.
Zeriga *vs.* Scott, 1 Woods, 496, 498.

Adopting construction of the State Court in regard to service by publication.

Guaranty Co. *vs.* R. R. 139 U. S. 137-148.

And substantially conclusive effect is given to such decisions upon the construction of State statutes as affecting the title to real estate within the State.

Bacon *vs.* Insurance Co. 131 U. S. 258, 264.
Gormley *vs.* Clark, 134 U. S. 338, 348.

The case of Cooper *vs.* Reynolds has been cited and explained in a number of subsequent cases and this court has, in a comparatively recent case, disavowed what appeared to be the semblance of dicta to the effect the jurisdiction to pronounce judgment is acquired by the actual seizure of the property attached or that defective or irregular affidavits and publication do not render a judgment void, and has held that a judgment in rem is not only void where there is no publication of the summons but also void where the statute in regard to publication has not been strictly followed, and void where the publication is not for the full term provided for by the statute.

Guarantee Trust Co. *vs.* Green Cove Ry. Co. 139 U. S. 137, 146, 147.
See also Pennoyer *vs.* Neff, 95 U. S. 714, 722.

Walker *vs.* Cottrell, 6 J. Baxt. (Tenn.) 258, 266.
Smith *vs.* Pomeroy, 2 Dillon 415, 420.
Dorr *vs.* Dorr, 82 Va. 359, 365.
Brown *vs.* Tucker, 7 Colo. 30, 36.

If the levy of the writ upon real property dispenses with the necessity for the service by publication of the summons or other process it must be on the ground that notice is inferable from the levy.

The purpose of levying the writ of attachment is not to give the defendant notice of the pendency of the suit, but to hold the property and prevent its alienation until the defendant has appeared or been notified to appear and there has been a trial, both as to the right of the plaintiff to a judgment and to have that judgment satisfied out of the property attached.

Notice of the pendency of the suit is inferable as a matter of fact from the actual manual seizure of personal property or the actual manual occupation of real property, because of the notoriety of these acts and of the probable prior possession of the defendant, by himself or his agent. No such notice is necessarily inferable, even as a matter of fact, from the levy of the writ upon real property, which is effected by the simple act of handing the writ and a memorandum of the levy to the recorder of deeds of the county where the property is situate, for there is nothing in such an act to call the defendant's attention to the fact, that a suit has been instituted against him and, notwithstanding such act, he might remain in possession of the property from the institution of the suit until it had gone to judgment and execution and until the time for appeal or writ of error had expired and be in ignorance of the whole affair.

This Court and the Supreme Courts of the great majority of the States, and all of the text writers have held that neither an actual manual seizure of personal property, nor an actual manual occupation of real property, to say nothing of a mere levy of a writ of attachment, is sufficient to give a Court jurisdiction to render a judgment, either in

proceedings in rem or quasi in rem, and that besides such seizure, occupation or levy, there must be a reasonable notice to the defendant.

Cooley Const. Lim. 403.
Waples on Attachment, 315.
Wade on Attachment, Sec. 6.
The Mary, 9 Cranch, 126, 143.
Galpin *vs.* Page, 18 Wall. 350, 360.
Freeman *vs.* Alderson, 119, U. S. 185, 199.
Hassall *vs.* Wilcox, 130 U. S. 493, 504.
Arndt *vs.* Griggs, 134 U. S. 316, 323.
Scott *vs.* McNeal, 154 U. S. 34, 50, 51.
Bradstreet *vs.* Insurance Co., 3 Sumner 600, 607.
Brown *vs.* Tucker, 7 Colo. 30, 35.
Great West Mining Co. vs. Woodmas of Alston Co., 12 Colo. 46, 53, 54, 55, 56, 57.
Raynolds *vs.* Ray, 12 Colo. 108, 115.
Thompson *vs.* White, 25 Colo. 226, 230, 235.
Haywood *vs.* Collins, *et al.*, 60 Ill. 328, 332, 333, 334, 336, 337, 340, 341.
Bradley *vs.* Jamison, 46 Iowa, 68.
Walworth *vs.* Stevenson, 24 La. An. 251, 252, 253.
Woolridge *vs.* Monteuse, 27 La. An. 79, 81, 82.
Clark *vs.* Bryan, 16 Md. 171, 176, 177.
King *vs.* Hannington, 14 Mich. 532, 541.
Woolkins *vs.* Haid, 49 Mich. 299, 301.
Nugent *vs.* Nugent, 70 Mich. 52, 56.
Morey *vs.* Morey, 27 Minn. 205, 266, 267.
Barber *vs.* Morris, 37 Minn. 194, 195, 196.
Brown *vs.* St. Paul & N. P. Ry. Co., 38 Minn. 506, 507, 508.
Godfrey *vs.* Valentine, 39 Minn. 336, 337, 338.
Edwards *vs.* Toomer, 22 Miss. (14 Sm. & M.), 75, 77, 78, 79, 80.
Westcott *vs.* Archer, 12 Neb. 345, 349.
Murphy *vs.* Lyons, 19 Neb. 689, 690, 693.
Woodruff *vs.* Taylor, 5 Washb. (20 Vt.), 65, 76, 77.
Anderson *vs.* Cobern, 27 Wis. 559, 562.

So whether the judgments in these attachment cases be considered in personam or in rem, their validity depends upon the validity of the service upon J. M. Jardine, and, in either case, under Sec. 38 of the Code, supra, the corpora-

tion must be doing business in the State in order to authorize such service, and the service must have been made in the county of the action. But the judgments were in personam. If the service on Jardine was valid the judgments were good anywhere and could be enforced in any State, which is not true of a judgment in rem.

3. These judgments were void for the further reason that the records show that J. M. Jardine was not the agent of plaintiff in error at the time of the service of process upon him, and the plaintiffs in those actions had notice of the fact before any judgment was taken.

We refer to the sworn statement of J. M. Jardine, filed in the case brought by The A. W. Begole Mercantile Company (Folios 162, 163), which is quoted in the statement of the case. It was excluded by the court below, and the objection to its admission seems to have been sustained upon the ground that there was nothing to show that the notice had actually been called to the attention of the plaintiffs in the attachment suits or the party purchasing at the sheriff's sale. (Folio 164, pp. 97, 98.) The notice was filed in the Begole case; Emerson & Bradshaw were the attorneys for the plaintiffs in that case (Folio 119, page 67) and must be presumed to know what was contained in the court files of a case which they were conducting. They were also attorneys for the plaintiffs in the Ashenfelter case (Folio 106, p. 58) and in the Fennell case (Folio 132, p. 77) and Ashenfelter and Fennell applied to be made parties plaintiff in the Begole case. Notice to Emerson and Bradshaw was, therefore, it would seem, notice to all of the plaintiffs in those proceedings. J. C. Marsh, trustee for the judgment creditors, was the purchaser at the sheriff's sale (Folio 128, p. 73), and he was the president of the A. W. Begole Mercantile Company (Folio 120, p. 68), the plaintiff in the case in which the notice was filed. Plaintiff in error cannot see how it can be successfully contended that any of the parties interested were ignorant of this notice. These facts were all in evidence at the time the notice was ex-

cluded and plaintiff in error did not, therefore, offer the notice again.

The notice was filed in the County Court of Ouray County on May 27, 1895. (Folio 163, p. 97.) Default and judgment were not entered in the Ashenfelter case until June 27, 1895 (Folio 67, p. 34); in the Begole case until June 27, 1895 (Folio 70, p. 36); and in the Fennell case until July 10, 1895 (Folio 75, p. 39). The notice was therefore filed at least one month before any judgment was taken. It was the proper way to give notice of the fact that his agency had ceased. The plaintiff has lost nothing by the mistake in service. He can still proceed by publication if he has the property under attachment. There can be no estoppel, as might be the case if he had changed his position in reliance upon the supposed agent's authority.

The case of Stock Exchange *vs.* Keyes, 67 Ill. App. 460, seems to be directly in point. In that case one Curtis had been served as agent of the defendant corporation. The defendant filed a plea to the jurisdiction on the ground that Curtis was not its agent and this question was tried to a jury, and the lower court instructed the jury, among other things, that if Curtis had been acting as such agent and was carrying on business in the same ostensible manner at the time of service and the defendant had never given notice to the plaintiff that Curtis' authority had ceased, that they should find for the plaintiff, and the Supreme Court, in holding this instruction erroneous, says on pages 462 and 463:

"Another instruction was as follows: 'The Court instructs the jury that if they believe from the evidence that F. C. Curtis was employed by the defendant to transact the business of the defendant at Carlinville, Illinois, as agent, prior to the service of the summons in this case, and that at the time of the service of the summons he was still transacting business in the same ostensible manner, and that prior to that time the defendant had given no notice to those transacting business with said Curtis that he had ceased to rep-

resent defendant in that business, then the jury should find for the plaintiff."

"It is not perceived why it was necessary for the defendant to give notice to those transacting business with Curtis that his relation with it had ceased *so far as the matter of service is concerned*. If he was not at the time of the service the agent of the defendant the service was bad. Possibly those who had been dealing with him as the agent might continue to deal with him in that capacity and in the way as formerly, and rely upon his agency until notified to the contrary. We say possibly this might be so, but if so it would be upon the ground that for some reason growing out of the particular circumstances the principal should be estopped to deny the agency. But how can such doctrine find application here ?"

"The officer could not insist upon the supposed estoppel if he never had any prior dealing with Curtis, and he was put in no other or different position than if he had never heard of the supposed agency; neither can the plaintiff, if he has not been misled. He has not changed his position because he supposed the agency was continued; he has parted with nothing and lost no right by reason of anything done by the defendant in that regard. This instruction was erroneous, and, in view of the testimony which tended to show that the relation of Curtis with defendant had ceased several days before service, was calculated to mislead the jury."

The Court will note that in the case quoted above, nothing had occurred that would indicate to the plaintiff that the agency of Curtis had ceased. The case at bar is much stronger, for the reason that the removal of Jardine from the County of Ouray was a fact that should have given plaintiffs notice that his agency had ceased, since the statute required him to be a resident of Ouray County, Section 499 Mills' Ann. Stats. quoted above. To the same effect we cite the case of San Pedro Cattle Co. *vs.* Williams, 36 Pac. 34.

The facts set forth in J. M. Jardine's notice are sworn to and are nowhere contradicted by the records in the attachment cases or by the record in the case at bar. The notice was a part of the record in the Begole case, and, as such,

should have been admitted when the rest of the record was in evidence.

Evidently for the purpose of destroying the effect of this notice, the defendant in error introduced in evidence, over the objection of plaintiff in error, those portions of the certificates of the recorder of Ouray County, and of the Secretary of State of Colorado, which show that Jardine's authority had never been revoked of record. (Folios 64, 65). We contend that this evidence was incompetent, immaterial and irrelevant, not only because it was offered for the purpose of supplementing the records by extrinsic evidence, but also because the laws of Colorado make no provision for the filing in any public office of the notice of resignation of a designated agent or the revocation of his authority, nor do they prescribe any other means of giving such notice. Such a notice would not be entitled to record, and, if recorded, would be notice to no one.

"Constructive notice from the record being dependent upon purely statutory provisions, it naturally follows that such effect will not be given to any and every recorded instrument, but only to such as fall within the statute. Therefore, if an instrument be not of a kind authorized by the law to be recorded * * * the record thereof will be a mere nullity, and will not operate to give constructive notice."—Am. and Eng. Enc., 2d ed., Vol. 24, p. 142, and the long line of cases cited in Note 3.

And, in the absence of a statute, no notice of a revocation of a designated agent's authority is required.

Forrest *vs.* Pittsburg Bridge Co. 116 Fed. 357.

IV.

Plaintiff in error further contends, that, even assuming the Begole, Ashenfelter and Fennell judgments to be valid and regular in every respect, the sheriff's sale and deed made thereunder was void and insufficient to divest plaintiff in error of its title to the property: (*a*) Because the sheriff did not follow the precept of the Court in making the sale,

and (*b*) Because the records show that the sale was made in order to satisfy the judgment obtained by William C. Fulton, as well as the other judgments, and this Fulton judgment was void, for lack of jurisdiction, beyond any question.

(*a*) The authority of a ministerial officer in making a judicial sale is derived from the writ, or precept, placed in his hands by the Court. Any substantial departure from the instructions contained in the writ renders the sale void. Now what are the proceedings of the sheriff in making this sale, under which the defendant in error claims that plaintiff in error lost its title? He receives a writ of special execution issued in the case brought by the A. W. Begole Mercantile Company, which commands him to make out of the property attached, or so much thereof as may be necessary, the sum of $226.09, and the further sum of $24.58 costs, and to have the money ready "for adjustment according to law, allowing the several judgment creditors in proportion to the amount of their several claims adjusted." (Folio 127.) What does the officer actually do under the writ? According to his return he makes, not the sum of $250.67, as commanded, but the sum of $1,616.97 (Folio 128). We think it is an elementary proposition of law that the officer has no authority to sell more property than is sufficient to make the amount mentioned in the writ, or to sell the property for an amount substantially exceeding that required by the writ.

> Patterson vs. Corneal, 3 A. K. Marshall (Ky.), 618, 619.
> Blakely *vs.* Albert, 1 Dana (Ky.), 185.
> Hastings *vs.* Johnson, 1 Nev. 613, 614.
> Lockwood *vs.* Sturtevant, 6 Conn. 373, 388.
> Adams *vs.* Morrison, 4 N. H. 166, 167, 168.

The property of plaintiff in error, sold at this sale, consisted of seven lode mining claims and five mill sites and was perfectly susceptible of division. It brought the sum of $1,616.97 and it seems to be a mathematical certainty

that it would not have been necessary to have sold it all to make the sum of $250.67, the amount named in the writ.

It may be urged, however, that the sale was made under the prorating statute of Colorado, and the sheriff had the right, thereunder, to sell enough property to make the aggregate amount called for by all of the writs in his hands. This statute is found at Sections 92a and 92c of Mills' Annotated Code, and reads as follows:

Sec. 92a. "That no final judgment shall be rendered in a cause wherein an attachment writ has been issued and a levy made thereunder, until the expiration of thirty days after such levy has been made, and any creditor of the defendant making and filing an affidavit and undertaking, as hereinbefore required of the plaintiff, together with his complaint setting forth his claim or demand constituting his cause of action against the defendant, shall, *upon application to the court wherein such action is brought*, be made a party plaintiff in such action, and *may have like remedies* against the defendant to secure his claim or demand, as the law gives to the original plaintiff."

Sec. 92c. "The final judgment in said action shall be a *several* judgment, wherein each creditor named as plaintiff shall have and recover of the defendant the amount of his claim or demand, as found to be due together with his costs; and the money realized from the attachment and garnishee proceedings shall under the direction of the court, after paying all costs taxed and included in the said *several* judgments, be paid to the several judgment creditors in proportion to the amount of their several claims as adjusted and included in such several judgments; and the surplus of any such moneys, if any, shall be paid to the defendant by the order of the court."

Under this statute, the court should have made John Ashenfelter and P. H. Fennell parties plaintiff in the action brought by the A. W. Begole Mercantile Company. It should have entered a several judgment in favor of all of the attaching creditors and issued a special execution commanding the sheriff to make the aggregate sum of the amounts found due the several judgment creditors. It did

none of these things and does not appear to have proceeded under this statute at all. It did not make Ashenfelter or Fennell parties plaintiff in the Begole case. It did not enter a several judgment, but separate judgments in favor of each attaching creditor. It did not issue one special execution to carry into effect the several judgment, but a separate special execution for each separate judgment. It was not within the province of the sheriff to correct the errors of the court. He must obey the writ that actually issued if his acts are to be held valid.

It may be claimed that the sale was made under the alleged prorating order (Folios 128, 129). This order, as we have said, is undated, unsigned and does not appear to have ever been entered or even filed in the Court. It is a mere loose paper. But, in any event, it was not a writ directed to the sheriff, nor does it appear that the sheriff ever had the order in his hands. If he did receive it he did nothing under it, since he makes no return upon it. The defendant in error, in his suit to quit title, alleges that the sale was made under the special execution issued in the Begole case (Folio 82). The order could not have been made prior to August 16, 1895, because it recites the receipt of a telegram from Daniel Golden bearing that date, and the special execution was issued and placed in the hands of the sheriff on July 23, 1895. The officer would not have had time to publish the notice of sale between August 16 and August 24, 1895, the date of the sale.

(*b*) Plaintiff in error contends that, even conceding that the Begole, Ashenfelter and Fennell judgments were valid, and considering that the precept under which the property was sold, did, by virtue of the prorating statute of Colorado, authorize the sheriff to make the aggregate amount of all of the above judgments, the sale was nevertheless void, and insufficient to divest plaintiff in error of its title, because it was made for the purpose of satisfying the Fulton judgment also, and this latter judgment was unquestionably void.

The Court will note that in the record of the Fulton judg-

ment it appears from the affidavit for attachment that plaintiff in error is a foreign corporation (Folio 146); that there is nowhere in the record an allegation that could possibly be construed as alleging that plaintiff in error was doing business in the State; that it does not appear that any property was attached; that there was no proper service of the writ of attachment, since it is not returned by the officer to whom it was issued by the Court; that the plaintiff, Fulton, made no application, as required by the prorating statute, to be made a party plaintiff in the action brought by The A. W. Begole Mercantile Co., the first attaching creditor, nor is there any order or other action of the Court making him a party to that or any other suit, and that the execution is a general one and not direceted to the property attached in the other suits. The Fulton judgments stood on the records of the Court as a void personal judgment unconnected, in any way, with the Begole, Ashenfelter or Fennell judgments, and was held to be void by the Court below (Folio 133). It was not even an attachment suit, although a writ of attachment was sued out, because no property was levied on.

In the case of Railroad Co. *vs.* Estill, 147 U. S. 591, this Court in discussing the validity of service upon a foreign corporation in Missouri, in actions in personam, says, on page 607:

"Writs of attachment were sued out in the suits but no property was levied on, and hence the suits stand as though they had been instituted by summons alone."

If Fulton was not an attaching creditor, or if he was not made a party plaintiff in the original attachment suit, the prorating statute above quoted did not give the County Court of Ouray County jurisdiction to sell the property for his benefit, even if his judgment had been valid, and certainly not if his judgment was void. But we are assuming, in this portion of the argument, that the Begole, Ashenfelter and Fennell judgments were valid, and this raises the question whether a sale, valid in part, and void in part, is not

wholly void. If such a sale is to be deemed valid then it is possible for the holders of any number of void judgments, no matter how large in amount, to unite with the holder of a valid judgment, no matter how small, and by making a single sale, enforce, and, in effect, make valid all of their void judgments. If the sale is valid the judgment-debtor must pay the aggregate amount of all the judgments in order to redeem. It does not seem possible for the Courts to hold that such a sale is valid in part and void in part. If so, to what part of the property does the purchaser obtain the title, and to what part does the judgment-debtor retain title ? Courts of justice will not indulge in speculation of this kind. Such a sale must be wholly void. It is an elementary principle of law that a judicial sale, made in pursuance of a void judgment, is also void and confers no title on the purchaser, and that the purchaser must satisfy himself that the Court had jurisdiction. We can see no valid reason why, if the property is sold to satisfy a number of judgments, the purchaser should not be required to see that the Court had jurisdiction to render them all.

The Supreme Court of Colorado, in the case Bassick Mining Co. *vs.* Schoolfield, 10 Colo. 46, has held void an order of sale, made in the mechanic's lien case, in which there were various intervenors, some of whom claimed a lien upon the whole of the property and one of whom claimed a lien only on a part of the property, when the order directed all of the property to be sold and that all of the intervenors should prorate the proceeds of all the property. In other words it was held that the court had no jurisdiction to make an order of sale which directed that the proceeds of the whole property should be shared by a party who had a lien against only a part thereof. On page 51 the court says:

"We think it equally plain that the defect of jurisdiction which we have pointed out was not cured by the fact that the jurisdiction of the Court had attached to all the property under and by virtue of the petitions of the other lien

claimants. Their petitions did not invoke the jurisdiction of the court in respect to the Armstrong claim. We do not see that the court had any greater or different jurisdiction than if the subject matter of each petition had been tried and adjudicated separately. The same fundamental principles fix the limits of the power and authority of the court in the one case as in the other. Curtis *vs.* Leavitt, 15 N. Y. 116."

We have cited the above case not because we consider it as, in all respects, similar to the case at bar, but because we construe the decision to be an adjudication that if the order of sale is made, in part, without jurisdiction then such order is wholly void.

This case of Bassick Mining Company *vs.* Schoolfield was considered by the Circuit Court of Appeals for the Eighth Circuit, in the case of Ryan *vs.* Staples, 76 Fed. 721, S. C. 23, C. C. A. 541. This case in the Federal Court was a controversy between Staples, who held title to the property under the mechanics' lien foreclosure, and the sale mentioned in the case of Bassick Mining Co. *vs.* Schoolfield, and Ryan, who claimed title to the same property under subsequent attachment proceedings. The decision of the Federal Court turned mainly upon the question whether the judgment in the mechanics' lien case was void or merely erroneous. The Circuit Court of Appeals refused to follow the Supreme Court of Colorado, and held that the mechanics' lien suit was a single proceeding, and that the Court having jurisdiction of the parties and subject matter had jurisdiction to make the order of sale; that it was unnecessary for the Colorado Court to decide whether the Schoolfield judgment was void or simply erroneous, and that the Federal Court was not bound by the decision, since it was an adjudication of a principle of general jurisprudence, and that the defendant's title to the property had accrued before the decision by the Supreme Court of Colorado.

We desire to call the Court's attention to the features in which we believe the case at bar may be distinguished from

the case of Bassick Mining Co. *vs.* Schoolfield. In the first place, in the latter case all of the parties intervened and were all in court, and the defendant had an opportunity to protect its rights by a proper objection or by appeal or writ of error. The Court, in that case, had a right to enter some kind of a judgment that would bind every party to the suit. It had a right to decree that Armstrong (the party who had a lien against a part only of the property) should participate pro rata in the proceeds of that part of the property against which he established his lien. In the case at bar the Court had no jurisdiction to render any judgment at all in the Fulton case. It had never levied upon any property and had never obtained any jurisdiction in personam. The judgment was an absolute nullity. In the case of Bassick Mining Co. *vs.* Schoolfield, the Court may be said to have made an error in the distribution of the proceeds of sale by giving to a party more than he was entitled to, that party being entitled, however, to something.

We do not understand that the decision of the Circuit Court of Appeals in the case of Ryan *vs.* Staples in any way opposes our contention that an order of sale made, in part, for the purpose of satisfying a judgment void for lack of jurisdiction, is also void for lack of jurisdiction.

Nor does this decision of the Circuit Court of Appeals in any way deny the correctness of the law as stated in the above quotation from the decision of the Supreme Court of Colorado in the case of Bassick Mining Co. *vs.* Schoolfield. The Circuit Court of Appeals held that judgment to be, at most, simply erroneous; the Supreme Court of Colorado held it to be void for lack of jurisdiction of the subject-matter, but both decisions held that if the judgment was void the sale would be void. The case at bar also differs from the case of Ryan *vs.* Staples, supra, in the fact that the sale in our case was made after the decision of the Schoolfield case (decided in 1887) which may be said to have established a rule of property in Colorado.

It is submitted that if any one of the foregoing conten-

tions of plaintiff in error is sustained, then the proceedings in the County Court of Ouray County were void for lack of jurisdiction, and were not due process of law and, therefore, were insufficient to divest plaintiff in error of its title to the property in controversy; and that the motion of plaintiff in error for a directed verdict, in its favor, should, so far as these proceedings are concerned, have been granted.

V.

It is evident that the defendant in error himself was not entirely satisfied with a title derived through the County Court proceedings, for on March first, 1897, he brought the action to quiet title in the District Court of Ouray County.

In discussing this action to quiet title plaintiff in error makes the following contentions, viz:

(*a*) That both on account of the character of the service and of the nature of the action the proceeding was in personam.

(*b*) That if the action was in personam, then the decree was void, for lack of jurisdiction over plaintiff in error, because the record fails to show that plaintiff in error was doing business in Colorado at the time of service, although it does show service upon a designated process agent within the county of the action.

(*c*) That conceding that the record was sufficient to show that plaintiff in error was doing business in the State, at the time of service, the court below erred in not permitting plaintiff in error to prove, as a matter of fact, that it was not doing business, unless it should also prove that it had not designated a process agent.

(*d*) That if the action was in personam, then the court did not have jurisdiction to enter the decree establishing a title to the property in the defendant in error.

(*e*) That if the action had been in rem under the statute of Colorado, the court would, under that statute, have had no jurisdiction to enter the decree establishing the title to the property in the defendant in error, and

(*f*) That the whole proceeding was void for lack of jurisdiction over plaintiff in error, because, at the time the suit was brought, J. M. Jardine was not an agent of plaintiff in error, and defendant in error knew, or must be presumed to have known, that fact.

(*a*) The proceedings and decree were in personam because they were had in pursuance of, and were founded upon, a personal service within the State. The return of the officer upon the summons shows that service was made upon J. M. Jardine, the designated process agent of plaintiff in error, in Ouray County (Folio 87), and we submit that this fact alone should be sufficient to establish the personal character of the action.

However, an action to quiet title is, in the absence of statute otherwise providing, from its very nature, an action in personam. It is an equitable proceeding and equity acts in personam.

In the case of Hart *vs.* Sansom, 110 U. S. 151, Hart brought an action of ejectment against Sansom and the heirs of Thomas League, in the United States Circuit Court for the Northern Division of Texas, to recover a tract of land in that State. The defendants offered in evidence a judgment rendered, by default, by the District Court of Johnson County, Texas, against Hart and others, upon service by publication on Hart, in their favor. The record of the judgment showed that suit had been brought to remove cloud from title and for possession of the property, and the judgment was that Hart had no title, that certain deeds to other defendants be cancelled and that the plaintiffs in that action be given possession of the property. This judgment was received in evidence in the Circuit Court, and the jury was instructed that it divested plaintiff of his land. A writ of error was taken to this Court, which held the judgment of the District Court to be a nullity, saying, on page 154:

"Generally, if not universally, equity jurisdiction is

exercised in personam and not in rem, and depends upon the control of the court over the persons, by reason of their presence, or residence, and not upon the place where the land lies in regard to which relief is sought.

Upon a bill for the removal of a cloud upon title, as upon a bill for the specific performance of an agreement to convey, the decree unless otherwise expressly provided by statute, is clearly not a judgment in rem, establishing a title in land, but operates in personam only, by restraining the defendant from asserting his claim, and directing him to deliver up his deed to be cancelled, or to execute a release to the plaintiff." (Citing authorities.)

The statute of Colorado which provides for the bringing of suits to quiet title is Section 255, Mills' Annotated Code, which reads as follows:

"An action may be brought by any person in possession by himself or his tenant, of real property, against any person who claims an estate therein adverse to him, for the purpose of determining such adverse claim, estate or interest."

In Wall *vs.* Magnes, 17 Colo. 476, the question presented was whether, under the statute just quoted, it was necessary for the plaintiff to prove his title, in case the defendant made no claim of title himself. The Supreme Court held that the plaintiff was not bound to do this, upon the ground that the statute simply recognized the old chancery practice, saying on page 477:

"These provisions simply recognize in statutory form the familiar chancery proceedings whereby a party in possession of real property might compel persons claiming adverse estates or interests to come into court, specify the nature of their claims, and have them fully and finally adjusted."

Hence the statute of Colorado has been held by the Supreme Court of the State to be simply a recognition of the old chancery proceeding which was in personam and which was referred to in Hart *vs.* Sansom, supra.

(*b*) If the action was in personam then the record must show that plaintiff in error was doing business in Colorado at the time of service.

St. Clair *vs.* Cox, supra.

The following cases also hold or recognize the doctrine that a corporation must *be doing business in the State at the time of service of such process.*

Fitzgerald *vs.* Fitzgerald, 137 U. S. 99, 106.
Goldy *vs.* Morning News, 156 U. S. 518, 521, 522, 523.
C. M. L. Ins. Co. *vs.* Spratley, 172 U. S. 602.
Good Hope Co. *vs.* Ry. Barb F. Co., 22 Fed. 637, 638.
St. Louis W. M. Co. *vs.* Cod. Barb W. Co., Fed. 802, 804.
Clews *vs.* Woodstock I. Co., 44 Fed. 31, 32.
Mecke *vs.* V. T. M. Co., 89 Fed. 114, 115.
Doe *vs.* S. B. M. Co., 104 Fed. 685, 687.
Conley *vs.* Mathieson Alkali Works, 190 U. S. 406, 411.
Geer *vs.* Mathieson Alkali Wks., 190 U. S. 428, 430, 431.
Millan *vs.* M. R. F. L. Assn., 103 Fed. 764, 769, 771.

Now what does the record in this case of Walsh *vs.* Cosmopolitan Mining Company *et al.* in the District Court of Ouray County disclose in regard to the doing of business by the plaintiff in error in the State of Colorado? The only allegation in the complaint in regard to this matter reads as follows:

"First. That the defendant is a corporation organized under the laws of the State of Maine, for the purpose, among others, of carrying on a mining business in the County of Ouray and State of Colorado, and by certificate dated December 16, 1885, recorded in Book C-1, page 291, on January 21, 1886, the said J. M. Jardine afterwards was, as required by the laws of the State of Colorado, duly appointed as the authorized agent of the defendant company, upon whom process might be served." (Folios 81-82, p. 44.)

The only other statement in the record bearing on the question is found in the return of the summons by the

sheriff in which it is stated that service was made on Jardine, "the duly authorized agent of the defendant company and designated by it as the person upon whom service should be made." (Folio 87, p. 48)

These statements show that the plaintiff in error, some eleven years before the bringing of this suit, appointed a process agent in compliance with the laws of Colorado and that when it was organized it had the *purpose*, or intention, of doing business in that State. There is not a word in the entire record to show that it actually was doing business in Colorado, at the time of the service, or that it ever had done any business there. The "doing of business means" the *presence* of the corporation. The corporation might have the intention of going to Colorado, and might have appointed an agent, as required by the laws of that State, in order to enable it to do so, and yet not carry that intention into effect. If an individual entertained the purpose of going to Colorado, and engaged lodgings there, the courts of the State certainly would acquire no jurisdiction over him, personally, until he had crossed its borders. The same thing holds true in regard to foreign corporations.

We desire also, in this connection, to call the Court's attention to the fact that the certificate of incorporation of plantiff in error, which purports to enumerate the "*purposes* for which it was organized," is in evidence (Folios 54 to 56), and that not one word is said therein in reference to doing business in Ouray County or in Colorado. The defendant in error, in his answer filed herein, alleges that plaintiff in error abandoned this property as early as 1889, (Folio 11) and that defendant in error has been in possession thereof since June 16, 1896, so that there is no suggestion, in the case at bar, that plaintiff in error was doing business in the State.

If plaintiff in error correctly understands the rule laid down in St. Clair *vs.* Cox, supra, the fact that the corporation is actually doing business, or in other words, is actu-

ally present in the State, at the time of the service, must appear affirmatively from the record. The allegation that some eleven years before the bringing of the suit the corporation had had the intention, and had qualified itself to do business in the State, would, it seems to plaintiff in error, hardly meet the requirements of the rule.

The court below seems to have admitted this record in evidence upon the theory that it was shown that J. M. Jardine had been *designated* as the agent of the company, upon whom process might be served, and that this designation amounted to a voluntary appearance, by the corporation, in case such agent was served, whether the corporation was doing business in the State or not. See opinion of court (Folios 102, 103, 104, pp. 56-57), also (Folio 166, p. 98.)

That such is not the law, we submit, the authorities which we present will fully show.

The case of Forrest *vs.* Pittsburg Bridge Co., 116 Fed., 357, 358, 359, supra, had been decided, by the Circuit Court of Appeals for the Seventh Circuit, before the trial of the case at bar in the court below. The decision, however, had not been published, and the case was not brought to the attention of the court. In that case the question of the validity of service upon a designated agent of a foreign corporation, whose authority was unrevoked of record, after the corporation had ceased doing business in the State, was squarely presented by a motion to quash such service. On pages 358-359, the court, speaking through Mr. Justice Grosscup, says:

"Subject to some criticism as to form and definiteness, the affidavits submitted show that, at the time of the alleged service of summons, Church did not, in fact, represent the Pittsburg Bridge Company. This would dispose of the case, but for this argument: that a foreign corporation, having filed its certificate, in pursuance of the Illinois act naming a representative, continues to be suable in the State, by service on such named representative—irrespective of the corporations actual withdrawal from the State, or the

actual cessation of the agency—until another certificate has been filed setting forth that the person named in the previous certificate is no longer the corporation's representative.

"It would perhaps be competent by apt legislation, to make this the law; but, in the absence of legislation to that end, we do not feel authorized to hold that a foreign corporation may be held to have been found in the State, when it, in fact, at the time, was not doing business in the State; or be held to be represented by an agent, who,in fact, held at the time, no such agency. We find nothing in the act of 1897 disclosing any such legislative intent; nor in the act of 1899, though under certain penalties it provides for notice to the secretary of the state of any change in the name and address of the corporation's agent or representative.

"The manifest purpose of the amendment in the act of 1899, was to require foreign corporations, doing business in the State, to give notice of any change in the name or address of its agent; but this does not imply that such corporation may not withdraw from business in the State without having given such notice. Under what conditions a foreign corporation may withdraw has not been made the subject-matter, so far as we are advised, of any legislation whatever."

We submit that it is utterly impossible to reconcile the decision in this case, with the ruling of the court below in admitting in evidence the record of this suit to remove cloud from title.

The statutes of Colorado do not provide for any notice of revocation of a designated agency. Neither do they prescribe any method, formality or notice of any kind when a foreign corporation withdraws from the State, nor do they, expressly or by implication, continue the authority of the designated agent beyond that time. On the contrary, the only statute having any bearing upon service upon agents of a foreign corporation is Section 38, Subdivision 9th of the Code, supra, and this statute expressly limits such service to agents of corporations "doing business in the State."

Under this statute the authority of a designated agent to bind the corporation, by the receipt of service of process, is not greater, or other, than that of any general agent, and is as independent upon the fact of "doing business in the State," in the one case as in the other.

The designating of a process agent is not a voluntary act on the part of a foreign corporation. It is done to comply with the laws of the State, and thus secure the right to do business there, and the corporation must be presumed to make the appointment, with the statutes prescribing the conditions upon which it can do business, in view. When the corporation withdraws from business in the State, the authority of its designated agent as well as its other agents, at least in the absence of statutes otherwise providing, ceases.

The rule announced in Forrest *vs.* Bridge Co., supra, viz: That the authority of a *designated* agent is dependent upon the doing of business in the State, unless such authority is continued by express statute, is sustained by both Federal and State authorities.

In the case of The People *vs.* Commercial Alliance Life Insurance Company, 40 N. Y. S. 269, 271, the validity of a judgment, in Maine, against a foreign corporation, by service upon the State Insurance Commissioner, designated as a process agent by statute, after the company had ceased to do business in Maine, was before the court in New York. In this case the company ceased to do business on the 30th day of June and the service was made on the 3d day of July of the same year. The Court held the service bad, saying, on page 271:

"The judgment must stand, if at all, on the service made on the State Insurance Commissioner, which was on the 3d day of July; and the referee found in substance that the service was ineffectual to bind the company in New York, because on that day the company was not doing business in the State of Maine, and that the Maine court had no jurisdiction of the company to render a judgment enforceable outside the State of Maine. When a foreign

corporation undertakes to transact business in a State other than that in which it is incorporated, it undoubtedly submits itself to the authority of the courts of that other State, and will be bound by the statutory provisions respecting such courts obtaining jurisdiction over it. Gibbs *vs.* Insurance Co., 65 N. Y. 114. While this Commercial Alliance Company was transacting business in the State of Maine, it was subject to the provisions of the State of Maine respecting service of process in an action against it on the State Commissioner of Insurance, in the absence of any authorized agent of the company upon whom service might be made. But that subjection does not last forever. As the Commercial Alliance Insurance Co. had ceased to do business on the first day of July, 1894, had withdrawn from the State, and had no authorized agent upon whom service might be made after that date, the substituted service on the State Commissioner would not bind it as the equivalent of personal service. The effect of the statute of Maine was to constitute the Insurance Superintendent the agent of the company to receive process under certain circumstances, viz., while such company was doing business in the State * * * But after the 30th day of June, 1894, it was not a foreign corporation doing business within the State of Maine and the Maine courts had no jurisdiction over it to render a judgment in personam against it on substituted service."

In the case of the Mutual Reserve Fund Life Association *vs.* Boyer, 61 Pac. 387, 388, 390, 391, (Kas.) the company had ceased to do business in the State of Kansas about two years before suit was brought and service was made upon the Insurance Commissioner. The Kansas statute expressly made an appointment of the Insurance Commissioner "irrevocable." The court held the service invalid, on page 390, saying:

"The instrument filed with the superintendent of insurance was in the nature of a power of attorney. What meaning must be given to the term 'irrevocable' used in this power of attorney? Does it mean that the statute implies 'never to be revoked'; never to be abrogated, annulled or withdrawn? We cannot think it comprises such significance."

And again on page 391:

"With the withdrawal of the insurance company from this State the subject-matter with respect to which the power was conferred, to wit, the business here transacted by the company thereunder, and with the probably exception above-mentioned (cause of action arising in the State expressly provided for by the Kansas statute) the company ceased to be amenable to our jurisdiction."

In the case of Eureka Company *vs.* California Insurance Co. 130 Calif. 153, it appeared that service was made upon a person who had formerly been an agent of the defendant foreign corporation, but that at the time of service the foreign corporation had ceased to do business in the State. Upon a suit upon a judgment obtained on this service, the court held the judgment void, saying on pages 154, 155:

"Plaintiff brought this action on a judgment rendered in its favor against the defendant in the Circuit Court of the State of Alabama. Judgment was rendered in favor of the defendant and the plaintiff has appealed.

The defendant is a corporation organized under the laws of this State, with its office and principal place of business at San Francisco. In the action brought against the defendant in the State of Alabama service of process was made upon a person who had at one time been the agent of the defendant in that State but who had ceased to be such agent prior to the time of said service and at that time the defendant had ceased doing business in the State of Alabama and had no agency or agent within the State. Upon this service the defendant made default and judgment was rendered against it for the amount claimed by the plaintiff.

"Under these facts it must be held that the Circuit Court of Alabama did not obtain jurisdiction of the person of the defendant and that the judgment entered against the defendant did not create a right of action against the defendant in the courts of this State (St. Clair *vs.* Cox, 106 U. S. 350; Henning *vs.* Planters Ins. Co., 28 Fed. 440). The jurisdiction of the Alabama court was the essential part of the plaintiff's cause of action herein, and it was incumbent upon the plaintiff to make proof of such jurisdiction in order to entitle it to judgment. The recital in the

judgment that 'proof was made in open court that George Eustice, on whom service was made in this cause, was agent of the defendant at the time of service of the summons and complaint on him' is not conclusive of the jurisdiction of the court over the defendant, it does not preclude the defendant from showing that Eustice was not such agent (*In re* Estate of James, 99 California, 374; Greenzweig *vs.* Strelinger, 103 Calif. 278)."

In the case of De Castro *vs.* Telegraph Co., 76 Fed. 425, 426, there was a service on the agent of the company after it had ceased to do business in the State of New York, and on page 426, Lacombe, J., says:

"When it is questioned whether or not a corporation is to be 'found' within a Federal district, so that general service of a summons can be effected upon it and not merely such qualified service as will affect only such property as it may have within the district, the test to be applied is whether or not it is doing business within the district. When it organizes to do business here, it comes here; while it continues to do business it remains; and when it finally ceases to do business, it departs. It has been held by the Supreme Court that service upon an officer of a non-resident corporation who is temporarily within the State is not sufficient to give jurisdiction of a foreign corporation not doing business within the State, although the State statute as interpreted by the highest court of the State expressly authorizes such mode of service. Goldey *vs.* Morning News, 156 U. S., 518, 15 Sup. Ct. 559. It is not so easy to see that, the mere refusal of the State authorities to revoke the designation for purposes of service, made while the corporation was in business here, will operate to prolong indefinitely the original designation long after the corporation may have departed."

In the case of Guthrie *vs.* Indemnity Association, 101 Tenn. 643, the court, after reciting that the plaintiff had attempted to get service upon the defendant through the Insurance Commissioner, and that such service had been held void because the defendant was not doing business in the State, holds, that service upon Witherspoon, the local agent of the defendant, when the transaction was made, is, for the same reason, void under the statutes.

On page 650 the court quotes the statute of Tennessee as follows:

"The act of 1887 provides that any non-resident corporation doing business in this State shall be subject to suit here, so far as relates to any transaction had in whole or in part in this State, or in causes of action arising here, but not otherwise."

One James Witherspoon had been the agent of the company when the policy was issued, but prior to the suit the company had ceased doing business in the State. On page 652 the court says:

"It does not appear that this company was found transacting business during the year 1895, and hence we think that the Circuit Court Judge was in error in holding that the service of process might have been on James Witherspoon under the act of 1887."

The case of Graves *vs.* Posner (Covenant Mut. L. Ins. Co., garnishee), 82 N W., 1022 (Iowa), holds that service upon the State Auditor as the designated agent of a foreign insurance company, can only be made while the company is doing business in the State, saying on page 1023:

"The society began business in the State in 1836, and, as its designated attorney had been dead several years, all service of process or notice, prior to October 1, 1897, was properly had on the State Auditor. But under the code such associations, as a condition precedent to doing business in the State, were required to 'file in the office of the Auditor of State an agreement in writing that thereafter service of notice or process of any kind may be made on the Auditor of State, and when so made shall be as valid, binding and effective for all purposes as if served upon the company according to the laws of this or any other State, and waiving all claim or right of error by reason of such acknowledgment of service.' Sec. 1722. It will be observed that by this written agreement power is conferred on the auditor to acknowledge service, and not independent of it. Without such consent he might not act in behalf of the association. No one questions the right of the State to prescribe the method by which cor-

porations doing business within its limits may be brought into court, and if they persist in transacting business in the State doubtless they will not be heard to plead non-compliance with this statute. Sparks *vs.* Association, 100 Iowa, 459, 69 N. W., 678. But no agreement was on file before December 2, 1897, and the evidence fails to show the transaction of any business by the garnishee between October 1st and that date. The association had a reasonable time within which to settle upon the course it would pursue, and the law indulges in the presumption, in the absence of proof to the contrary, that in the meantime it yielded obedience to this statute. Its annual report indicates a large amount of business during the year, but not in this interim, *and it does not appear from the record* that any insurance certificates were issued.

"No jurisdiction over the Covenant Mutual Life Association was acquired, and defendant's motion to discharge it as garnishee was rightly sustained."

As was suggested in the case of Forrest *vs.* Bridge Co., supra, there is no doubt that it would be competent for a State to provide that a foreign corporation should be liable in its courts, upon all transactions that occurred while it is doing business there, although it had ceased doing business at the time of service, but if such is to be the effect the statute must so provide.

Green *vs.* Life Association, 105 Iowa, 628, 637–8.

In the case of Hazeltine *vs* Insurance Co., 55 Fed., 743, 750, the Court after holding that the insurance company had never done business in the State of Maine was therefore not liable to suit there under the statute of Maine, says, on page 750:

"The truth about the matter is that while the obvious spirit of the thing contemplated by your statutes is that, in the exercise of their dominion over persons and things situate within their territory, and their conceded power to regulate the terms upon which foreign corporations shall be admitted to traffic with those persons and about those things, they desire to provide, with commendable justice, that whenever a cause of action arises or relates to persons and things within their respective dominion by the destruc-

tion of the property insured, or other injury or breach of contract, these corporations shall submit to judgment there, and the citizens of that State shall not be forced to go to a distant jurisdiction, to the corporate domicile, to bring their suit or to get their money. But they do not use apt words to compel these, and the courts on the language we have here, must rule, upon the case we cite, that that object has not been accomplished. The remedy is to amend the legislation and to define the conditions upon which the corporation may act more explicitly."

Indeed this Court has held, practically, in the case of Mutual R. F. L. Association *vs.* Phelps, 190 U. S. 147, 156, S. C. 23 Sup. Ct. R. 707, that the statute of Kentucky, as interpreted by the court of appeals of that State, in the case of Germania Ins. Co. *vs.* Ashby, 23 Ky. L. Rep. 1516, S. C. 65 S. W. 611, continues the authority of the Commissioner of Insurance as a designated agent to receive service of process, although the company may have ceased to do any new business in the State, at least so far as transactions made in the State when it was doing business there are concerned.

It is to be observed, that, in this Kentucky case, the corporation was, at the time of service, engaged in transacting a substantial part of its business in the State, viz., that of collecting premiums and adjusting losses on old business, but, we believe, that even if this had not been so, this court would have followed the Kentucky Court of Appeals, not only for the reason that it was an interpretation of a State statue by its court of last resort, but because that interpretation was reasonable and just. The Kentucky statute as quoted in the case of Germania Ins. Co. *vs.* Ashby, supra, reads as follows:

"Before authority is granted to any foreign insurance company to do business in this State it must file with the Commissioner a resolution adopted by its Board of Directors consenting that service of process upon any agent of such company in this State, or upon the Commissioner of Insurance of the State in any action brought or pending in this State shall be a valid service upon said Company."

This case of Germania Insurance Co., *vs.* Ashby, supra, was decided upon the authority of the case of Home Ben. Soc. *vs.* Muehl, 59 S. W., Rep. 520, decided by the Kentucky Court of Appeals, December 7, 1900. In this last mentioned case the court quotes on page 520, the Kentucky statute of 1870 which was repealed by the statute last quoted above which was passed in 1893. The Act of 1870 contained an *express* provision continuing the authority of the agents of foreign insurance companies to receive service of process, after the withdrawal of the corporation from the State, so far as any transactions made in the State were concerned. The court read the two statutes together and held that the purpose of the Act of 1893 was, not to repeal that part of the Act of 1870 which continued the agent's authority, but on the contrary that its purpose was to provide an agent who could be served when the other agents were no longer in the State.

The fact that the Kentucky statute of 1893 does not limit the time of the continuance of the commissioner's authority and provides for the appointment of a corporation *sole* which never dies, as agent, together with the fact that the corporation is required to agree in advance that such service shall be valid indicates very strongly that it was the intention of the Legislature of Kentucky to continue the authority of the Commissioner after the corporation withdrew from the State, at least so far as transactions made in the State were concerned, especially, when it is remembered that the Kentucky statute of 1870 had expressly so continued the authority of other agents of the corporation.

The statutes of Colorado on this subject will bear no such construction, however. Section 499 of Mills' Ann. Stats, supra, provides for the *appointment* of process agents by foreign corporations and for the convenience of the Court is quoted again, viz:

Sec. 499. "Foreign corporations shall, before they are authorized or permitted to do business in this State, make

and file a certificate signed by the president and secretary of such corporation, duly acknowledged, with the Secretary of State, and in the office of the Recorder of Deeds of the county in which such business is carried on, designating the principal place where the business of such corporation shall be carried on in this State, and an authorized agent or agents in this State residing at its principal place of business upon whom process may be served."

Paragraph Ninth of Section 38, of the Colorado Code, supra, which is the only statute providing for the *service* of process on these designated, and other agents is quoted again and reads as follows:—

"Sec. 38. A summons shall be served as follows:

"Ninth. If the action be against a foreign corporation, or joint stock company or association, organized under the laws of another State or Territory, *and doing business within this State* the summons *shall* be served by delivering a copy to any agent of such corporation, company or association *found in the county* in which the action is brought. If no such agent be found in such county, then by delivering a copy of the summons to any stockholder who may be found in such county."

It will be seen that the Colorado statutes provide for the appointment of a natural person and not a corporation sole as in Kentucky; that they restrict such appointment to individuals residing at the designated principal place of business; that they confine the authority of such agents to suits brought in the county where they are served; and that they expressly limit the service of process upon any agent of a foreign corporation to those corporations which are doing business in the State (Rust *vs.* Water Works Co., supra). Not only is there no indication of an intention on the part of the Colorado legislature to continue the authority of designated agents beyond the cessation of business by the corporation in the State, but the contrary intention is clear, manifest and express.

(*c*) If, however, we concede that the allegations contained in this record were sufficient to show that plaintiff in error was doing business in the State, then we contend

that plaintiff in error should have been permitted to prove that it was not doing business there without being compelled to prove also that it had not designated a process agent.

We think that we have shown that the "doing of business" or the actual presence of the foreign corporation within the territorial jurisdiction of the court, is a juris dictional averment in an action in personam, and, if contained in the record, it may be controverted by extrinsic evidence.

We submit that it has also been shown that, in Colorado, a designated process agent's authority ceases when the corporation withdraws from the State, and if this statement of the law is correct, then the evidence offered by plaintiff in error to prove that it was not doing business in Colorado, at the time of service of process in this suit to quiet title, should have been admitted without condition.

(*d*) Our next contention, in reference to this suit to quiet title, is that the action being in personam, the court had no jurisdiction to enter a decree therein establishing the title to the property in the defendant in error.

Our authority for this statement is Hart *vs.* Sansom, 110 U. S. 151, supra, where this court in discussing a suit to quiet title, as an action in personam, and the power of the court in such a case, says on page 155 :

"It has no inherent power by the mere force of its decree, to annul a deed, or to establish a title."

The decree, of which this Court was speaking, in that case, after annulling certain deeds, declared that Hart had no title to the property and gave possession to the plaintiffs. The decree in question here, so far as pertinent, reads as follows :

"It is therefore considered, adjudged and decreed by the Court, that the said defendants have not, nor have either of them any right, title, interest, claim or demand in or to any part of the premises above described, and that the pretended claim of the defendant, The Cosmopolitan

Mining Company, in and to said premises is wholly without right or justification in law. *That the plaintiff is the owner* and in possession of the premises and mining claims above described and entitled to the quiet and peaceable possession of said mining claims and each of them." (Folio 92.)

The District Court of Ouray County decreed, not only that plaintiff in error had no title, but that defendant in error did have title, and was the owner of the property. Such a decree, if given effect, must certainly establish a title.

Defendant in error, in his complaint in that action, alleges, as his sole source of title, the judgments rendered in the County Court cases, the execution and sale made in the case brought by the A. W. Begole Mercantile Company, the sheriff's deed made in pursuance thereof, and a conveyance to himself by the sheriff's grantee (Folios 82-83). If this sheriff's sale was void, he had no title before the decree was signed, but the property belonged to plaintiff in error. If defendent in error has title now it must be by virtue of the decree. How then can he be heard to say that the decree did not establish a title in him, but simply quieted his title, when he had no title to be quieted? If the decree is to be given effect, it must be given the effect of having transferred the title from plaintiff in error to defendant in error and of having established the title in the latter.

(*e*) Thus far we have discussed this proceeding as an action in personam. We wish, now, to take up the question of the jurisdiction of the court to enter a decree establishing a title, if it had been rendered in pursuance of constructive service, and, therefore, might be considered in rem.

A State must, from the obvious necessities of the case, have the right to provide, by statute, that constructive service may be had, upon absent defendants, in actions to quiet title to lands within the State. The State of Colorado has, inferentially at least, exercised this right in enacting Section 25-35 Mills' Ann. Stats., which reads as follows:

"In all actions pending in any court of record of this State, or which may hereafter be brought in any such court wherein any defendant is not found within the jurisdiction of the court, and constructive service alone is had, and which is brought * * * for the removal of cloud from title to real estate * * * or in any other proceeding in rem, or effecting only specific property, where according to the usual practice in courts of chancery, the court, if the defendant had been personally served, might direct or decree any act to be done or performed by the defendant in favor of the plaintiff, the court may appoint a trustee for such defendant to do and perform in the place and stead of and for each defendant the act required by the decree rendered in any such cause. Any act lawfully done by such trustee, under and in pursuance of any such decree shall be as binding and effectual for all purposes as if done and performed by the defendant in pursuance of such decree."

The case of Hart *vs.* Sansom, supra, recognizes the right of a State to enact just such a statute as this, but holds that, in that case, the court acts in personam and has no power to establish a title, saying on page 155:

"It would, doubtless, be within the power of the State in which the land lies to provide by statute that, if the defendant is not found within the jurisdiction or refuses to make or cancel a deed, this should be done in his behalf by a trustee appointed by the court for that purpose. Felch *vs.* Hooper, 119 Mass. 52; Ayer *vs.* Murray, 105 U. S. 128–132."

"But in such a case, as in the ordinary exercise of its jurisdiction, a court of equity acts in personam, by compelling a deed to be executed or cancelled by or in behalf of the party."

"*It has no inherent power by the mere force of its decree, to annul a deed or to establish a title.*"

The case of Arndt *vs.* Griggs, 134 U. S., 316–318, 329, held that a State had power, by express statute, to provide, not only for constructive service upon absent defendants, but also to provide that the title to the lands might be established in such a proceeding.

The Nebraska Statute under which Arndt *vs.* Griggs is

decided, reads, Section 57 (Compiled Laws of Nebraska, 1885):

"An action may be brought and prosecuted to final decree, judgment or order, by any person or persons, whether in actual possession or not, and claiming title to real estate, against any person or persons, who claim an adverse estate or interest therein, for the *purpose of determining such estate or interest*, and quieting the title to such real estate."

Section 58:

"All such pleadings and proofs and subsequent proceedings shall be had in such action now pending or hereafter brought, as may be necessary to fully determine the question of title as between the parties to said real estate, *and to decree the title to the same or any part thereof*, to the party entitled thereto; and the court may issue the appropriate order to carry such decree, judgment or order into effect."

But if the law announced in Hart *vs.* Sansom is to be changed or modified, express legislation is necessary to effect that result, and we submit that the statute of Colorado which we have quoted and which is the only statute relating to the subject, did not give the District Court of Ouray County jurisdiction to enter the decree establishing the title to the property in the defendant in error, even assuming that the proceeding had been in rem. The statute must be strictly complied with. (Bleidorn *vs.* Pilot Mt. C. M. Co., 89 Tenn. 167, 177–8.)

(*e*) But if this action to quiet title had been regular and valid in every other respect, we submit that it would be void for lack of jurisdiction over plaintiff in error, if J. M. Jardine was not its agent at the time he was served and, especially, if defendant in error knew, or would be presumed to know, that he was not such agent.

Jardine's affidavit to the effect that he was not such agent and refused to act as such had then been on file in the record of the case brought by the A. W. Begole Mercantile Co. for nearly two years. Defendant in error relied

upon the record in that case, as well as the others, as the source of his title, as appears from his complaint in the action to quiet title. Either he, or his attorney, which amounts to the same thing, must be presumed to have known the contents of a document that was a part of the records constituting his title. That the defendant in error's attorney did have actual knowledge of the affidavit is indicated by the fact that he made Mr. Jardine a party defendant in the action to quiet title, although Jardine had never had anything to do with the title to the property, nor had he been a party to any of the proceedings in the County Court through which the defendant in error claimed title. Jardine was, we submit, made a party defendant in order that he might have an opportunity to file the answer which he did file therein one day after he was served (see return of summons folio 87, and Jardine's answer, folio 84), which answer was intended to explain and contradict the affidavit as far as possible. The answer shows this upon its face and reads as follows:

"Now comes the defendant J. M. Jardine, and for answer to the complaint filed herein says:

First. That the only interest he has had in this matter grows out of the fact that the summons in each of the original actions in the complaint mentioned was served upon him as agent of the defendant company, and that upon said writ being so served upon him, he duly mailed the same to the president of the defendant company with postage fully paid, in envelopes with return card printed thereon. The said letters were not returned to this defendant nor was he instructed in any manner by the defendant company, or its officers to defend said actions, nor did he have any knowledge of facts on which said actions could be defended, and therefore allowed judgments in said action to be taken without interposing any defense on the merits. That since the entry of said judgment and the sale of the premises in the complaint thereunder, he has

not claimed, nor pretended to claim any interest in said premises adverse to the plaintiff.

We submit, therefore that, in the suit to quiet title, the decree rendered therein, was void, for lack of jurisdiction and for want of due process of law, and was insufficient to divest plaintiff in error of its title to the property in controversy, and that, so far as this proceeding, also, is concerned, the motion of plaintiff in error for a directed verdict should have been granted.

Respectfully submitted.

WILLIAM H. MOODY,
CARLTON M. BLISS,
Attorneys for Plaintiff in Error.

Of Counsel:
HURLBURT, JONES & CABOT.

JOHN A. PERRY.
GEORGE C. PRESTON.

APPENDIX.

THE A. W. BEGOLE MERCANTILE CO.
vs.
COSMOPOLITAN MINING CO.

STATE OF COLORADO, } *ss:*
County of Ouray, }

In the County Court Thereof.

THE A. W. BEGOLE MERCANTILE COMPANY, a Corporation, *Plaintiff*, *vs.* THE COSMOPOLITAN MINING COMPANY, a Corporation, *Defendant.* } Complaint.

The plaintiff complains and alleges:

I. That the amount involved in this action for which relief is sought does not exceed the sum of two thousand dollars.

II. That the plaintiff is a corporation duly incorporated and organized under and by virtue of the laws of the State of Colorado and at all times hereinafter mentioned has been such corporation doing business in the City of Ouray, County of Ouray and State aforesaid.

III. That the defendant is a corporation duly incorporated and organized under and by virtue of the laws of the State of Maine, *with its principal office in the State of Colorado at Ouray, in said Ouray County.*

And for its first cause of action against the defendant the plaintiff alleges:

I. That on or about the 24th day of July, 1894, the defendant was indebted to plaintiff for and upon an account for goods, wares and merchandise sold and delivered by plaintiff to defendant, at defendant's special instance and request, in the sum of $137.32, said goods, wares and merchandise being furnished between the 8th day of May, 1894, and the date last aforesaid.

II. That the said sum of $137.32 has not been paid nor any part thereof, and the same is now due and owing from defendant to plaintiff, together with interest thereon at the rate of eight per cent per annum from the said 24th day of July, 1894.

And for a second cause of action against the defendant the plaintiff alleges :

I. That on or about the 1st day of January, 1895, the defendant was indebted to the San Juan Hardware Company, a corporation doing business in the said City and County of Ouray, in the sum of $75.70, for and upon an account for goods, wares and merchandise sold and delivered by the said San Juan Hardware Company to the defendant's special instance and request, between the 17th day of May, 1894, and the date last aforesaid.

II. That on or about the 25th day of April, 1895, the said The San Juan Hardware Company, assigned, transferred and set over to this plaintiff said account for collection.

III. That the said sum of $75.70 has not been paid nor any part thereof, and the same is now due and owing from the defendant together with interest thereon at the rate of eight per cent per annum from the 1st day of January, 1895.

Wherefore plaintiff demands judgment against the defendant.

1. For the sum of $137.32, together with interest thereon from the 24th day of July, 1894, as in the first cause of action herein set forth.

2. For the sum of $75.70, together with interest thereon from the 1st day of January, 1895, as in the second cause of action herein set forth.

3. For costs of suit and for such other relief as to this court may seem meet and proper.

(Signed) EMERSON AND BRADSHAW,
Attorneys for the Plaintiff.

(Above document was duly verified and endorsed.)

STATE OF COLORADO, County of Ouray, } ss:

In the County Court Within and for the County of Ouray Aforesaid.

THE A. W. BEGOLE MERCANTILE COMPANY, a Corporation, *Plaintiff*, *vs.* THE COSMOPOLITAN MINING COMPANY, a Corporation, *Defendant*. } Complaint.

J. C. Marsh, president of the plaintiff corporation of said county, being duly sworn, doth depose and say that The Begole Mercantile Company against whom the said A. W. Begole Mercantile Company is about to sue out an attachment is indebted to him in a sum not exceeding twenty hundred dollars, to wit, the sum of two hundred thirteen and $\frac{2}{100}$ dollars with interest; and that the said demand is now due and owing, and that the sum is due and owing from the defendant to the plaintiff for and upon an overdue book account for goods, wares, and merchandise sold and delivered by the plaintiff to the defendant, at defendant's special instance and request, between the 8th day of May, 1894, and the 24th day of July, 1894, amounting to $137.32; and upon an overdue book account for goods, wares, and merchandise sold and delivered by the San Juan Hardware Company to defendant at defendant's special instance and request, between the 17th day of May, 1894, and the 1st day of January, 1895, amounting to $75.70, and by the said The San Juan Hardware Company assigned to the plaintiff herein for collection.

(Signed) J. C. MARSH.

Sworn and subscribed to before me this 26th day of April, A. D. 1895.

ROBERT H. WILSON,
Judge and Clerk,
By MARY F. WILSON,
Dep. Clerk.

[SEAL.]

(Above document was duly endorsed.)

STATE OF COLORADO, } ss:
Ouray County, }

In the County Court in and for the County of Ouray, in the State Aforesaid.

THE A. W. BEGOLE MERCANTILE COMPANY, a Corporation, *Plaintiff*, *vs.* THE COSMOPOLITAN MINING COMPANY, a Corporation, *Defendant*. } Undertaking on Attachment.

Whereas, the above-named plaintiff has commenced, or is about to commence, an action in the County Court in and for the County of Ouray, in the State aforesaid, against the above-named defendant, upon a contract for the direct payment of money, claiming that there is due to the said plaintiff from the said defendant the sum of two hundred and thirteen and $\frac{100}{100}$ dollars lawful money of the United States, besides interest, and is about to apply for an attachment against the property of the said defendant as security for the satisfaction of any judgment that may be recovered therein.

Now, therefore, we, the undersigned, residents of the County of Ouray, State of Colorado, in consideration of the premises and of the issuing of said attachment do jointly and severally undertake in the sum of four hundred and seventy-five dollars and promise to the effect, that if the said defendant recover judgment in said action, or if the said court shall finally decide that the said plaintiff was not entitled to an attachment, the said plaintiff will pay all costs that may be awarded to the said defendant and all damages which it may sustain by reason of the wrongful suing out of the said attachment, not exceeding the sum of four hundred and seventy-five dollars.

Dated this 26th day of April, A. D. 1895.

(Signed) A. W. BEGOLE MERC. CO.
(Signed) J. C. MARSH, *President*.
J. C. LANGLEY.

(On the back of the foregoing document was a form of jurat, but same was not filled out. Document was duly endorsed.)

STATE OF COLORADO, County of Ouray, } *ss :*

In the County Court Within and for the County of Ouray, State of Colorado.

THE A. W. BEGOLE COMPANY, a Corporation, *Plaintiff*, *vs.* THE COSMOPOLITAN MINING COMPANY, a Corporation, *Defendant.* } Writ of Attachment.

The People of the State of Colorado to the Sheriff of the said County of Ouray, Greeting :

Whereas, the above-entitled action was commenced in the County Court in and for the said County of Ouray in the State of Colorado, by the plaintiff in the said action to recover from the defendant, The Cosmopolitan Mining Company in the said action the sum of two hundred and thirteen and $\frac{00}{100}$ dollars, lawful money of the United States, besides interest at the rate of 8 per cent per annum from the day of , A. D. 189 , and costs of suit ; and the necessary affidavit and undertaking herein having been filed as required by law :

Now, we do therefore command you, the said sheriff, that you serve a copy hereof on the above defendant, if he be found in your county, and also attach and safely keep all the property of said defendant, The Cosmopolitan Mining Company, within your said county, not exempt from execution, or so much thereof as may be sufficient to satisfy the said plaintiff's demand as above mentioned, unless the said defendant deposit with you an amount, or give you security by an undertaking of at least two sufficient sureties, in an amount

sufficient to satisfy such demand, besides costs, or in an amount equal to the value of the property which has been or is about to be attached ; in which case you will take such undertaking, and hereof make due and legal service and return.

Witness Robert H. Wilson, judge and clerk of said court, and the seal thereof at Ouray, this 26th day of April, A. D. 1895.

[SEAL] ROBERT H. WILSON,
Judge and Clerk,
By MARY F. WILSON,
Deputy Clerk.

STATE OF COLORADO, } *ss :*
Ouray County, }

I do certify that I have duly executed the within writ on this 26th day of April, A. D. 1895, by levying upon and attaching all the right, title, interest, claim, and demand and equity of redemption of the Cosmopolitan Mining Company in and to the following real property, to-wit : The Yellow Rose lode ; the Crusader lode ; the Norma lode ; the Talisman lode ; the Hidden Treasure lode ; the Gertrude lode, and the Emily lode mining claim, situate in Imogene basin, Mt. Sneffles mining district, County of Ouray and State of Colorado, and also the mill sites and each and every of them in said basin, district, county and State, to said lodes and each and every of them belonging, which said lodes and mill sites are more accurately described in detail and identified by metes and bounds in the books of record in and for the recorder's office of the said county of Ouray and State of Colorado, and to which reference is hereby made. And I hereby certify that I have further executed the within writ by filing a true copy of this levy in the office of the county clerk and recorder of Ouray County, said State, this the 26th day of April, 1895. Further, that I have been unable to make service of

the within writ on the within-named defendant, there being no person within my said county upon whom process might be served.

MAURICE CORBETT,
Sheriff.

(The foregoing document was duly endorsed.)

STATE OF COLORADO, } *ss:*
County of Ouray, }

In the County Court.

THE A. W. BEGOLE MERCANTILE COMPANY, a Corporation, *Plaintiff*, *vs.* THE COSMOPOLITAN MINING COMPANY, a Corporation, *Defendant*. } Summons.

The People of the State of Colorado to the Cosmopolitan Mining Company, a Corporation, the Defendant above named, Greeting:

You are hereby required to appear in an action brought against you by the above-named plaintiff in the County Court of Ouray County, State of Colorado, and answer the complaint therein within twenty days after the service hereof, if served within this county; or if served out of this county, or by publication, within thirty days after the service hereof, exclusive of the day of service; or judgment by default will be taken against you according to the prayer of the complaint. And if a copy of the complaint in the above-entitled action be not served with this summons, or if the service hereof be made out of this State, then ten days additional to the time hereinbefore specified for appearance and answer will be allowed before the taking of judgment by default as aforesaid.

The said action is brought to recover the sum of $137.32, with interest, for goods, wares and merchandise sold and delivered by plaintiff to defendant; and the further sum of $75.70, with interest, for goods, wares and merchandise sold and delivered by the San

Juan Hardware Company to defendant, and by the said hardware company assigned to this plaintiff for collection and for costs of suit, as will more fully appear from the complaint in said action to which reference is here made. *

And you are hereby notified that if you fail to appear, and to answer the said complaint as above required, the said plaintiff will take judgment by default against you in accordance with the prayer of said complaint.

Given under my hand and the seal of said court at Ouray in said county, this 29th day of April, A.D. 1895.

[SEAL.] ROBERT H. WILSON,
Judge and Clerk.
MARY F. WILSON,
Deputy Clerk.

*A copy of which is hereto attached.

STATE OF COLORADO, }
County of San Miguel, } *ss:*

I do hereby certify that I have duly served the within summon, together with a copy of the complaint in the within-stated action, on this 7th day of May, A. D. 1895, by personally delivering a true copy of said summons, together with a copy of the original complaint in the action therein mentioned, thereto attached, to J.M. Jardine, *the duly authorized agent* of the within defendant company.

J. C. RUTAN,
Sheriff.

(The foregoing document was duly endorsed.)

STATE OF COLORADO, } ss.
County of Ouray, }

In the County Court Within and for the County of Ouray, State of Colorado.

THE A. W. BEGOLE MERCANTILE COMPANY, a Corporation, *Plaintiff*, vs. THE COSMOPOLITAN MINING COMPANY, a Corporation, *Defendant*. } Writ of Attachment.

The People of the State of Colorado to the Sheriff of the County of San Miguel, Greeting:

Whereas, the above-entitled action was commenced in the County Court in and for the said County of Ouray, in the State of Colorado, by the plaintiff in the said action to recover from the defendant Cosmopolitan Mining Co. in the said action the sum of two hundred thirteen and $\frac{2}{100}$ dollars, lawful money of the United States, besides interest at the rate of 8 per cent per annum from the day of , A. D. 189 , and costs of suit; and the necessary affidavit and undertaking herein having been filed as required by law:

Now, we do therefore command you, the said sheriff, that you serve a copy hereof on the above defendant if he be found in your county, and also attach and safely keep all the property of said defendant Cosmopolitan Mining Co. within your said county, not exempt from execution, or so much thereof as may be sufficient to satisfy the said plaintiff's demand as above mentioned unless the said defendant deposit with you an amount, or give you security by an undertaking of at least two sufficient sureties, in an amount sufficient to satisfy such demand, besides costs, or in an amount equal to the value of the property which has been or is about to be attached; in which case you will take such undertaking and hereof make due and legal service and return.

Witness my hand as the clerk of said court, and the seal thereof at Ouray this 29th day of April, A. D. 1895.

ROBERT H. WILSON,
Judge and Clerk,
By MARY F. WILSON,
Deputy Clerk.

STATE OF COLORADO, } *ss:*
San Miguel County, }

I do hereby certify that I have duly executed the within writ on this 7th day of May, A. D. 1895, by delivering a true copy of the within writ to J. M. Jardine, *the duly authorized agent* of the within defendant company.

J. C. RUTAN,
Sheriff.

(The foregoing document was duly endorsed.)

STATE OF COLORADO, } *ss:*
County of Ouray, }

In the County Court Thereof.

THE A. W. BEGOLE MERCANTILE COMPANY,
Plaintiff,
vs.
THE COSMOPOLITAN MINING COMPANY,
Defendant.
} Motion.

Come now J. M. Jardine, upon whom papers purporting to be a summons and writ of attachment in the above-entitled cause were served on May 8, 1895, and respectfully represents to the court:

1st. That he is not, and has not been for several years past, a resident of Ouray County in said State, and therefore could not be an agent of defendant company in accordance with the general laws of this State under the facts alleged in the complaint herein.

2d. That he has not for years acted as agent of said company defendant, does not consider himself or hold

himself out to be such agent, and refuses to accept service or do any other act on behalf of said defendant.

Wherefore he moves the court to quash the service of said summons and writ and hold the same for naught.

(Signed) J. M. JARDINE.

STATE OF COLORADO, } ss:
San Miguel County. }

Subscribed and sworn to before me this 18th day of May, 1895.

My commission expires May 16, 1899.

STEPHEN A. BAILEY,
Notary Public.

Endorsed on the back as follows:

STATE OF COLORADO, }
Ouray County. }

In the County Court.

THE A. W. BEGOLE MERCANTILE COMPANY, }
vs.
THE COSMOPOLITAN MINING COMPANY. }

Notice to the court that party purporting to have been served was not an agent of defendant.

Filed May 27, 1895.

ROB'T H. WILSON,
Judge and Clerk.

STATE OF COLORADO, } ss:
Ouray County, }

In the County Court in and for said County.

THE A. W. BEGOLE MERCANTILE COMPANY, a Corporation, *Plaintiff*, *vs.* COSMOPOLITAN MINING COMPANY, a Corporation, *Defendant*. } Default and Judgment.

The defendant Cosmopolitan Mining Company, having failed to appear and answer, move or demur to the

complaint in this action, according to law, as required by the summons, the plaintiff hereby applies for default and entry of judgment.

Dated this 14th day of June, A. D. 1895.

To Robert H. Wilson, judge of said court.

(Signed) EMERSON & BRADSHAW,
Plaintiff's Attorney.

(The foregoing default and judgment was duly endorsed.

THE A. W. BEGOLE MERCANTILE COMPANY, a Corporation, *Plaintiff*, *vs.* THE COSMOPOLITAN MINING COMPANY, a Corporation, *Defendant*. } Default.

On this 27th day of June, 1895, plaintiff by its counsel, Emerson and Bradshaw, appeared and filed their application for default herein against the above-named defendants and it appearing to the court that summons has been served upon one J. M. Jardine, the *heretofore* duly authorized and acting agent for said company, and that the said defendant has made no appearance herein; and it further appearing that the complaint of plaintiff is duly verified, and that the time for the appearance of said defendant has expired. It is therefore ordered that default do and the same hereby does enter against said defendant.

THE A. W. BEGOLE MERCANTILE COMPANY, a Corporation, *Plaintiff*, *vs.* THE COSMOPOLITAN MINING COMPANY, a Corporation, *Defendant*. } 1437. Judgment.

Now on this day appeared Emerson and Bradshaw, attorneys, for plaintiff, the said defendant appearing not, and moved the court that the said cause come on for hearing upon its merits, whereupon the evidence on behalf of plaintiff was introduced before the court without the intervention of a jury. And it appearing to the court that the said defendant is justly indebted to

the said plaintiff in the sum of 226.09 dollars, including interest to date. And it further appearing that default has been duly entered herein in favor of the plaintiff and against the said defendant.

It is therefore ordered by the court, after being fully advised in the premises and after having heard the testimony of the said plaintiff introduced herein in open court, that the said plaintiff The A. W. Begole Mercantile Company do have and recover of and from the said defendant The Cosmopolitan Mining Company the just and full sum of two hundred and twenty-six $\frac{9}{100}$ dollars together with its costs herein expended taxed at 24.58 dollars.

And it is further ordered that the attachment herein be sustained. For which judgment let special execution issue.

(Signed) ROBERT H. WILSON,
Judge.

STATE OF COLORADO, } ss :
Ouray County, }

In the County Court.

THE A. W. BEGOLE MERCANTILE COMPANY,
Plaintiff,
vs.
THE COSMOPOLITAN MINING COMPANY,
Defendant.
} Prorating Order.

Now on this day this cause comes on to be heard on motion of Emerson & Bradshaw, attorneys for the above-named plaintiff, for an order prorating the amount to be realized from the sale of the attached property by the several attaching and judgment creditors, and it appearing to the court that the following judgments have been rendered and entered against the Cosmopolitan Mining Company under and by virtue of the several attachments issued out of this court as follows, to wit :

The A. W. Begole Mercantile Company, $226.09,

John Ashenfelter $49.82, P. H. Fennell $126.12, W. C. Fulton $1,049.90, and D. L. Golden $.

And it further appearing to the court that in said suit property belonging to the defendant company was attached for the purpose of satisfying such judgments as might be obtained by the several plaintiffs against the said defendant company.

It is therefore ordered that the sheriff of Ouray County proceed to sell the above described property or so much thereof as shall be necessary to satisfy said several judgments, together with the costs and interest thereon.

And it is further ordered that in case the sum realized from such sale shall not be sufficient to satisfy said several judgments, interest, and costs in full, that then the amount realized from said sale shall be appropriated as follows, to wit:

First. To the payment of all costs connected with the said several suits and proceedings.

Second. The amount remaining to be prorated and paid to the said several judgment creditors in accordance with the amounts of the said several judgments entered herein, save and except as to the judgment obtained by D. L. Golden; and with respect to said judgment it appearing to the court that a telegram dated Denver, August 16, 1895, was received by the above-named plaintiff and signed by the said Golden stating that his judgment had been settled; it is ordered by the court that the sale of said property and that this prorating order shall not extend to or include said judgment of the said D. L. Golden, but that the same shall stand in abeyance until the further order of this court in the premises.

Witness Robert H. Wilson, Judge and clerk of said court, this day of , 1895.

STATE OF COLORADO, } ss:
County of Ouray, }

In the County Court Within and for said County and State.

THE A. W. BEGOLE MERCANTILE COMPANY, a Corporation, *Plaintiff*,
vs.
COSMOPOLITAN MINING COMPANY, *Defendant*.

To Robert H. Wilson, Judge and Clerk of said Court:

You will please issue special execution in the above-entitled cause, and this shall be your warrant therefor.

(Signed) EMERSON & BRADSHAW,
Attorney's for Plaintiff.

STATE OF COLORADO, } ss:
Ouray County, }

The People of the State of Colorado to the Sheriff of Ouray County, Greeting:

Whereas, by virtue of a certain writ of attachment, issued out of our County Court on the 26th day of April, A. D. 1895, and that on the 26th day of April, 1895, you levied upon the "Yellow Rose" lode, "Crusader" lode, "Norma" lode, "Talisman" lode, "Hidden Treasure" lode, "Gertrude" lode, and "Emily" lode, in Imogene basin, Mt. Sneffles mining district, said county and State; also the mill sites thereof, particularly described in the location certificates thereof, on record with the Clerk and Recorder of said county and State as the property of the Cosmopolitan Mining Company, as appears by your certificate of levy, filed and recorded in this office; and whereas, afterward, to wit, on the 27th day of June, A. D. 1895, by the consideration of our County Court, the A. W. Begole Mercantile Company recovered judgment against the said The Cosmopolitan Mining Company for the sum of two hundred twenty-six $\frac{9}{100}$ dollars, damages, and also the further sum of twenty-four $\frac{58}{100}$ dollars, costs of suit, as appears of record.

We therefore command you, that you immediately proceed to sell the property by you levied upon, as hereinbefore described, or so much thereof as is necessary to make the aforesaid sums of money, with interest on said judgment, from the day of the rendition of the same, and have the same money ready, as soon as may be, to render unto the said Court for adjustment according to law, allowing the several judgment-creditors in proportion to the amount of their several claims as adjusted.

Hereof fail not and make return of this writ, with your doings endorsed thereon, in ninety days from the date hereof.

Witness Robert H. Wilson, Judge and Clerk of said County Court and the seal thereof at Ouray this 23d day of July, A. D. 1895.

[SEAL.] ROBERT H. WILSON,
Judge and Clerk.

STATE OF COLORADO, }
Ouray County, } *ss:*

In obedience to the command of the within execution, I have executed the within writ by offering for sale on the 24th day of August, 1895, in the manner provided by law, and selling the property described in said writ, at public sale at the front door of the court-house in the City and County of Ouray, Colorado, that said mining claims were first offered for sale separately; receiving no bids on said claims I offered the same for sale all together. That in accordance with an agreement entered into by and among the several prorating judgment-creditors, the same was struck off and sold to J. C. Marsh, as trustee, for the several judgment-creditors for the sum of $1,616.97; and I therefore return this execution fully satisfied.

(Signed) MAURICE CORBETT, *Sheriff.*

(The foregoing document was duly endorsed.)

JOHN ASHENFELTER,

vs.

COSMOPOLITAN MINING CO.

STATE OF COLORADO, } ss:
County of Ouray, }

In the County Court.

JOHN ASHENFELTER, *Plaintiff*,
vs.
THE COSMOPOLITAN MINING COMPANY, a Corporation, *Defendant*. } Complaint.

Plaintiff complains and alleges:

I. That the amount involved in this action and for which relief is sought does not exceed the sum of two thousand dollars.

II. That the defendant is a corporation duly incorporated and organized under and by virtue of the laws of the State of Maine, *with its principal office in the State of Colorado, at the City of Ouray at said Ouray County.* And by way of complaint against the defendant the plaintiff alleges:

I. That on or about the 31st day of December, A. D. 1894, the defendant was indebted to the plaintiff in the sum of $47.90, for and upon an account for work and labor done and performed and services rendered by the plaintiff for said defendant at defendant's special instance and request between the 1st day of June, 1894, and the date last aforesaid, which should have been paid for at the completion of such work.

II. That the said sum of $47.90 has not been paid nor any part thereof, and the same is now due and owing from defendant to this plaintiff, together with interest thereon at the rate of 8% per annum from the 31st day of December, 1894.

III. That on or about the 26th day of April, 1895, suit was commenced against the defendant herein by The A. W. Begole Mercantile Company in this court,

wherein a writ of attachment was issued out of this court and a levy made thereunder by the sheriff of said Ouray County attaching all of the real property of the said defendant found in said county.

Therefore plaintiff asks:

1. For judgment against the defendant herein for the said sum of $47.90, together with interest thereon from the 31st day of December, 1894, at 8 per cent per annum.

2. That he may be made a party plaintiff in the said suit hereinabove mentioned and be given like remedies against the defendant herein as the law gives to the original plaintiff in the said action.

3. For costs of this action, and for general relief.

(Signed) EMERSON & BRADSHAW,
Attorneys for the Plaintiff.

(Above document is duly verified and endorsed.)

STATE OF COLORADO, } ss:
County of Ouray, }

In the County Court Within and for the County of Ouray aforesaid the Term, A. D. 18 .

JOHN ASHENFELTER,
Plaintiff.
vs.
THE COSMOPOLITAN MINING COMPANY,
a Corporation, *Defendant.*

John Ashenfelter, of said county, being duly sworn, doth depose and say that The Cosmopolitan Mining Co., against whom the said is about to sue out an attachment is indebted to him in a sum not exceeding twenty hundred dollars, to wit, the sum of forty-seven and $\frac{90}{100}$ dollars; and that the said demand is now due and owing and that the sum is due from defendant to plaintiff for and upon an account for work and labor done and performed and services rendered by plaintiff for defendant at defendant's special instance and request, between June 1, 1894, and December 1,

1894, which should have have been paid for at the completion of such work; with interest from Dec. 31, 1894, at 8% per annum.

(Signed) JOHN ASHENFELTER.

Sworn and subscribed to before me this 21st day of May, A. D. 1895.

ROBERT H. WILSON,
Judge and Clerk,

[SEAL.] By MARY F. WILSON,
Deputy Clerk.

(The above document was duly endorsed.)

STATE OF COLORADO, } *ss:*
County of Ouray, }

In the County Court of the State of Colorado Sitting Within and for the County of Ouray.

JOHN ASHENFELTER, *Plaintiff,* *vs.* COSMOPOLITAN MINING COMPANY, a Corporation, *Defendant.*	Undertaking on Attachment.

Whereas, the above-named plaintiff has commenced, or is about to commence an action in the County Court within and for the County of Ouray, against the above named defendant, upon a contract for the direct payment of money, claiming that there is due to the said plaintiff from the said defendant the sum of forty-seven and $\frac{90}{100}$ dollars, lawful money of the United States, besides interest, and said plaintiff is about to apply for an attachment against the property of the said defendant as security for the satisfaction of any judgment that may be recovered therein.

Now, therefore, we, the undersigned residents of the County of Ouray, State of Colorado, in consideration of the premises, and of the issuing of said attachment, do jointly and severally undertake in the sum of one hundred and ten dollars, lawful money, and promise to the

effect that if the said defendant recover judgment in said action, or if the said court shall finally decide that the said plaintiff was not entitled to an attachment, the said plaintiff will pay all costs that may be awarded to the said defendant and all damages which it may sustain by reason of the wrongful suing out of the said attachment, not exceeding the sum of one hundred and ten dollars. Dated this 21st day of May, A. D. 1895.

(Signed) JOHN ASHENFELTER.
(Signed) GOE M. SEEGER.

(On the back of the foregoing document was a form of jurat but was not filled out. The document was duly endorsed.)

STATE OF COLORADO, } *ss:*
Ouray County, }

In the County Court of the State of Colorado Within and for the County of Ouray.

JOHN ASHENFELTER, *Plaintiff.* *vs.* COSMOPOLITAN MINING COMPANY, a Corporation, *Defendant.* } Writ of Attachment.

The People of the State of Colorado to the Sheriff of the said County of Ouray, Greeting:

Whereas, the above-entitled action was commenced in the County Court of the State of Colorado in and for the said County of Ouray, by the plaintiff in the said action, to recover from the defendant Cosmopolitan Mining Company in the said action the sum of forty-seven and $\frac{90}{100}$ dollars, lawful money of the United States, besides interest at the rate of 8 per cent per annum from the 31st day of December, A. D. 1894, and costs of suit; and the necessary affidavit and undertaking herein having been filed as required by law;

Now, we do therefore command you————, the said sheriff, that you serve a copy hereof on the above defendant, if it be found in your *county*, and also at-

tach and safely keep all the property of said defendant within your said county, not exempt from execution or so much thereof as may be sufficient to satisfy the said plaintiff's demand, as above, and in the affidavit herein mentioned, unless the said defendant deposit with you the amount or give you security by an undertaking of at least two sufficient sureties, in an amount sufficient to satisfy such demand, besides costs or in an amount equal to the value of the property which has been or is about to be attached, in which case you will take such undertaking; and hereof make due and legal service, and return.

Witness Robert H. Wilson, Judge and Clerk of said Court, and the seal thereof, at Ouray, this 21st day of May, A. D. 1895.

[SEAL.] (Signed) ROBERT H. WILSON,
Judge and Clerk,
By MARY F. WILSON,
Deputy Clerk.

STATE OF COLORADO, } *ss:*
Ouray County, }

I do hereby certify that I have duly executed the within writ on this 22d day of May, A. D. 1895, by levying upon and attaching all the right, title, interest, claim and demand and equity of redemption of the Cosmopolitan Mining Company, in and to the following real property, to-wit: The Yellow Rose lode, the Crusader lode the Norma lode, the Talisman lode and the Hidden Treasure lode, the Gertrude lode and the Emily lode mining claims, situate in Imogene basin, Mt. Sneffles mining district, County of Ouray and State of Colorado, and also the mill sites and each and every of them in said basin, district, county and State, to said lodes and each and every of them belonging, which said lodes and mill sites are more accurately described in detail and identified by notes and bonds in the book of

record, in and for the Recorder's office of the said County of Ouray and State of Colorado, and to which reference is hereby made. And I further certify that I have filed a true copy of this levy and attachment for record with the Clerk and Recorder in and for said Ouray County, Colorado.

MAURICE CORBETT,
Sheriff.

(The foregoing document was duly endorsed.)

STATE OF COLORADO, } *ss* :
County of Ouray, }

In the County Court.

JOHN ASHENFELTER,
Plaintiff,
vs.
COSMOPOLITAN MINING COMPANY,
a Corporation, *Defendant.*
} Summons.

The People of the State of Colorado to Cosmopolitan Mining Company, the defendant above-named, Greeting :

You are hereby required to appear in an action brought against you by the above-named plaintiff, in the County Court, of Ouray County, State of Colorado, and answer the complaint therein, within twenty *twenty* days after the service hereof if served within this county ; or if served out of this county, or by publication, within thirty days after the service hereof, exclusive of the day of service ; or judgment by default will be taken against you according to the prayer of the complaint.

And if a copy of the complaint in the above-entitled action be not served with this summons, or if the service hereof be made out of this State, then ten days additional to the time hereinbefore specified for appearance and answer will be allowed before the taking of judgment by default as aforesaid.

The said action is brought to recover from the defendant the sum of $47.90, with interest from December 31st, 1894, at 8 per cent per annum, amount alleged to be due from the defendant to plantiff on account of work and labor done and performed and services rendered by plantiff for defendant, at its special instance and request, between the 1st day of June, 1894, and the 31st day of December, 1894, as will more fully appear from the complaint in said action to which reference is here made.*

And you are hereby notified that if you fail to appear, and to answer the said complaint as above required, the said plaintiff will take judgment by default against you in accordance with the prayer of said complaint.

Given under my hand and the seal of said Court at Ouray in said county, this 21st day of May, A. D. 1895.

[SEAL.] ROBERT H. WILSON,
Judge and Clerk,
By MARY F. WILSON,
Deputy Clerk.

(Index.) *A copy of which is hereto attached.

STATE OF COLORADO, }
County of San Miguel, } *ss:*

I do hereby certify that I have duly served the within summons together with a copy of the complaint in the within-stated action, on this 23d day of May, A. D. 1895, by personally delivering a true copy of said summons, together with a copy of the original complaint in the action therein mentioned, thereto attached, to the within named defendant, J. M. Jardine, *duly authorized agent* for the within-named defendant company.

(Signed) J. C. RUTAN, *Sheriff.*

(The foregoing document was duly endorsed.)

STATE OF COLORADO, County of Ouray, } ss:

In the County Court of the State of Colorado within *in* and for the County of Ouray.

JOHN ASHENFELTER, *Plaintiff*, *vs.* COSMOPOLITAN MINING COMPANY, a Corporation, *Defendant*. } Writ of Attachment.

The People of the State of Colorado to the Sheriff of the County of San Miguel, Greeting:

Whereas, *in* the above-entitled action was commenced in the County Court of the State of Colorado in and for the said County of Ouray, by the plaintiff in the said action to recover from the defendant Cosmopolitan Mining Co., in the said action, the sum of forty-seven and $\frac{90}{100}$ dollars, lawful money of the United States, besides interest at the rate of 8 per cent per annum from the 31st day of December, A. D. 1894, and costs of suit; and the necessary affidavit and undertaking herein having been filed as required by law,

Now, we do therefore command you.————— —— the said sheriff, that you serve a copy hereof on the above defendant, if he *it* be found in your county, and also attach and safely keep all the property of said defendant within your said county, not exempt from execution, or so much thereof as may be sufficient to satisfy the said plaintiff's demand, as above, and in the affidavit herein mentioned, unless the said defendant deposit with you the amount or give you security by an undertaking of at least two sufficient securities, in an amount sufficient to satisfy such demand, besides costs, or in an amount equal to the value of the property which has been or is about to be attached in which case you will take such undertaking; and hereof make due and legal service and return.

Witness Rob't H. Wilson, Judge and Clerk of said

Court, and the seal thereof, at Ouray, this 21st day of May, A. D. 1895.

[SEAL.] (Signed) ROB'T H. WILSON,
Judge and Clerk,
By MARY F. WILSON,
Deputy Clerk.

STATE OF COLORADO, San Miguel County, } *ss:*

I do hereby certify that I have duly executed the within writ on this 23d day of May, A. D. 1895, by delivering a true copy of the within to J. M. Jardine, *duly authorized agent* for the within named defendant company.

J. C. RUTAN, *Sheriff.*

(The foregoing document was duly endorsed.)

STATE OF COLORADO, County of Ouray, } *ss:*

In the County Court in and for said County.

JOHN ASHENFELTER, *Plaintiff,* *vs.* COSMOPOLITAN MINING COMPANY, *Defendant.* } Præcipe for Execution.

To Robert H. Wilson, Judge and Clerk of said Court:

You will please issue special execution in the above-entitled cause, and this will be your warrant therefor.

Dated this 23d day of July, A. D. 1895.

(Signed) EMERSON & BRADSHAW,
Plaintiff's Attorneys.

(The foregoing document was duly endorsed.)

JOHN ASHENFELTER, *Plaintiff,* *vs.* THE COSMOPOLITAN MINING COMPANY, a Corporation, *Defendant.* } 1439. Default.

Now, on this day, being the 27th day of June, 1895,

plaintiff, by his counsel, Emerson & Bradshaw, appeared and filed his application for default herein against the above-named defendant, and it appearing to the court that summons has been served upon one J. M. Jardine, the *heretofore* duly authorized and acting agent for said Company, and that the said defendant has made no appearance herein, and it further appearing that the complaint of plaintiff was duly verified, and that the time for the appearance of said defendant has expired; it is therefore ordered that default do and the same hereby does enter against said defendant.

JOHN ASHENFELTER,
Plaintiff.
vs.
THE COSMOPOLITAN MINING COMPANY,
a Corporation, *Defendant.*
} 1439. Judgment.

Now on this day appeared Emerson & Bradshaw, attorneys for plaintiff, the said defendant appearing not, and moved the court that the said cause came on for hearing upon its merits.

Whereupon the evidence on behalf of plaintiff was introduced before the court without the intervention of a jury. And it appearing to the court that the said defendant is justly indebted to the said plaintiff in the sum of 49 and $\frac{82}{100}$ dollars, including interest to date. And it further appearing that default has been duly entered herein in favor of the plaintiff and against the said defendant; it is therefore ordered by the Court after being fully advised in the premises and after *heard* the testimony of the said plaintiff introduced herein in open court, that the said plaintiff, John Ashenfelter, do have and recover of and from the said defendant, The Cosmopolitan Mining Company, the just and full sum of forty-nine and $\frac{82}{100}$ dollars, together with his costs herein expended, taxed at 22 $\frac{70}{100}$ dollars. And it is further ordered that the attachment herein be sustained. For which judgment let special execution issue.

ROBERT H. WILSON, *Judge.*

STATE OF COLORADO, } ss.:
County of Ouray, }

The People of the State of Colorado to the Sheriff of Ouray County, Greeting:

Whereas, by virtue of a certain writ of attachment, issued out of our County Court on the 21st day of May, A. D. 1895, and that on the 22d day of May, 1895, you levied upon the "Yellow Rose" lode; "Crusader" lode; "Norma" lode; "Talisman" lode; "Hidden Treasure" lode; "Gertrude" lode; and "Emily" lode; situate in Imogene basin, Mt. Sneffles mining district, county and State aforesaid, also the mill sites thereof, more particularly described in the location certificates thereof, of record with the clerk and recorder of said county and State as the property of the Cosmopolitan Mining Co., as appears by your certificate of levy, filed and recorded in this office; and

Whereas, afterward, to wit, on the 27th day of June A. D. 1895, by the consideration of our County Court, John Ashenfelter recovered judgment against the said The Cosmopolitan Mining Co., for the sum of forty-nine $\frac{82}{100}$ dollars damages, and also the further sum of twenty-two $\frac{70}{100}$ dollars, costs of suit, as appears of record.

We therefore command you, that you immediately proceed to sell the property by you levied upon, as hereinbefore described, or so much thereof as is necessary to make the aforesaid sum of money, with interest on said judgment from the day of the rendition of the same; and have the same money ready as soon as may be, to render unto the said court for adjustment among the several judgment-creditors in proportion to the amount of their respective claims according to law.

Hereof fail not, and make return of this writ, with your doings endorsed thereon in ninety days from the date hereof.

Witness Robert H. Wilson, Judge and Clerk of said

County Court, and the seal thereof hereto affixed, at Ouray, this 23d day of July, A. D. 1895.

[SEAL.] ROBERT H. WILSON,
Judge and Clerk.

By
Deputy.

STATE OF COLORADO, } *ss*:
County of Ouray, }

I hereby return the within execution fully satisfied in accordance with my return made on the execution issued in the case of The A. W. Begole Mercantile Company *vs.* The Cosmopolitan Mining Company.

MAURICE CORBETT, *Sheriff.*

(The foregoing document was duly endorsed.)

P. H. FENNELL
vs.
COSMOPOLITAN MINING CO.

STATE OF COLORADO, } *ss:*
County of Ouray, }

In the County Court.

P. H. FENNELL, *Plaintiff,*
vs.
COSMOPOLITAN MINING COMPANY, *Defendant.*
} Complaint.

The plaintiff complains and alleges:

I. That the amount involved in this action and for which relief is sought does not exceed the sum of two thousand dollars.

II. That the defendant is a corporation duly incorporated and organized under and by virtue of the laws of the State of Maine, *with its principal office in the State of Colorado at Ouray, in said Ouray County.*

And for a first cause of action against the defendant the plaintiff alleges:

I. That on or about the 1st day of August, 1894, the defendant was indebted to the plaintiff for and

upon an account for work and labor done and performed by said plaintiff for defendant, at the defendant's special instance and request, between the 30th day of June, 1894, and the date last aforesaid, in the sum of $58.75.

II. That the said sum of $58.75 has not been paid nor any part thereof, and the same is now due and owing from defendant to plaintiff with interest thereon at the rate of 8 per cent per annum from the first day of August, 1894.

And for a second cause of action against the defendant plaintiff alleges:

I. That on or about the 1st day of August, 1894, the defendant was indebted to one John Dowd in the sum of $58.75 for and upon an account for work and labor done and performed by the said Dowd for defendant, at defendant's special instance and request, between the 30th day of June, 1894, and the date last aforesaid.

II. That on or about the 22d day of May, 1895, the said Dowd assigned, transferred and set over said account to this plaintiff for collection.

III. That the said sum of $58.75 has not been paid nor any part thereof, and the same is now due and owing to this plaintiff from defendant together with interest thereon at the rate of 8 per cent per annum from the 1st day of August, 1894.

IV. That on or about the 26th day of April, 1895, suit was commenced against the defendant herein by the A. W. Begole Mercantile Company in this court, wherein a writ of attachment was issued out of this court and a levy made thereunder by the sheriff of said Ouray County, attaching all of the real property of said defendant found in said county.

Wherefore plaintiff demands judgment against the defendant.

1. For the sum of $58.75, together with interest thereon at the rate of 8 per cent per annum from the

first day of August, 1894, as in the first cause of action herein set forth.

2. For the sum of $58.75, together with interest thereon at the rate of 8 per cent per annum, as in the second cause of action herein set forth.

3. For costs of this action, and for general relief.

4. And the plaintiff asks the court further that he be made a party plaintiff in the said suit hereinabove mentioned and be given like remedies against the defendant herein as the law gives to the original plaintiff in the said action.

(Signed) EMERSON & BRADSHAW,
Attorneys for Plaintiff.

(Which complaint was duly verified.)

(The foregoing document was duly endorsed.)

STATE OF COLORADO, } *ss*:
County of Ouray, }

In the County Court Within and for the County of Ouray Aforesaid.

P. H. FENNELL,
Plaintiff,
vs.
COSMOPOLITAN MINING COMPANY,
a Corporation, *Defendant.*

Thomas Y. Bradshaw of said county, being duly sworn, doth depose and say that he is one of plaintiff's attorneys in the above action; that the Cosmopolitan Mining Company, against whom the said P. H. Fennell is about to sue out an attachment is indebted to him in a sum not exceeding twenty hundred dollars, to wit: The sum of one hundred seventeen and $\frac{50}{100}$ dollars and interest; and that the said demand is now wholly due and unpaid and that the same is for and upon account of work and labor done and performed by plaintiff for defendant, at defendant's special instance and request, in the sum of $58.75, and for work and labor done and performed as aforesaid for defendant, at defendant's

special instance and request, by one John Dowd in the sum of $58.75, and said last-named claim has been by said John Dowd assigned to plaintiff herein for collection, all of said work and labor being done and performed during the month of July, 1894; and which should have been paid for at the time of the completion of such work.

(Signed) THOMAS Y. BRADSHAW.

Sworn and subscribed to before me, this 23d day of May, A. D. 1895.

ROB'T H. WILSON,
Judge and Clerk,
By MARY F. WILSON,
Dep. Clerk.

[SEAL.]

(The foregoing document was duly endorsed.)

STATE OF COLORADO, } *ss:*
County of Ouray, }

In the County Court in and for the County of Ouray, in the State Aforesaid.

P. H. FENNELL, *Plaintiff,* *vs.* COSMOPOLITAN MINING COMPANY, a Corporation, *Defendant.* } Undertaking on Attachment.

Whereas, the above-named plaintiff has commenced or is about to commence an action in the County Court in and for the County of Ouray, in the State aforesaid, against the above-named defendant upon a contract for the direct payment of money, claiming that there is due to the said plaintiff from the said defendant the sum of one hundred seventeen and $\frac{50}{100}$ dollars, lawful money of the United States, besides interest, and said plaintiff is about to apply for an attachment against the property of the said defendant as security for the satisfaction of any judgment that may be recovered therein.

Now, therefore, we, the undersigned, residents of the County of Ouray, State of Colorado, in consideration of the premises, and of the issuing of said attachment, do jointly and severally undertake in the sum of two hundred and fifty dollars and promise to the effect that if the said defendant recover judgment in said action, or if the said court shall finally decide that the plaintiff was not entitled to an attachment, the said plaintiff will pay all costs that may be awarded to the said defendant and all damages which it may sustain by reason of the wrongful suing out of the said attachment, not exceeding the sum of two hundred fifty dollars.

Dated this 23d day of May, A. D. 1895.

(Signed) T. W. KNOWLES.

(Signed) W. H. FOURRELL.

(On the back of the foregoing document was a form of jurat but not filled out. The document was duly endorsed.)

STATE OF COLORADO, } *ss*:
County of Ouray, }

In the County Court Within and for the County of Ouray, State of Colorado.

P. H. FENNELL, *Plaintiff*,
vs.
THE COSMOPOLITAN MINING COMPANY, a Corporation, *Defendant*. } Writ of Attachment.

The People of the State of Colorado to the Sheriff of the said County of Ouray, Greeting:

Whereas, the above-entitled action was commenced in the County Court in and for the said County of Ouray in the State of Colorado by the plaintiff in the said action to recover from the defendant, Cosmopolitan Mining Co., in the said action the sum of one hundred and seventeen and $\frac{50}{100}$ dollars, lawful money of the United States, besides interest at the rate of 8 per

cent per annum, from the first day of August, A. D. 1894, and costs of suit; and the necessary affidavit and undertaking herein having been filed as required by law.

Now, we do therefore command you, the said sheriff, that you serve a copy hereof on the above defendant, if it be found in your county, and also attach and safely keep all the property of said defendant within your county, not exempt from execution, or so much thereof as may be sufficient to satisfy the said plaintiff's demand, as above mentioned; unless the said defendant deposit with you an amount or give you security by an undertaking of at least two sufficient sureties in an amount sufficient to satisfy such demand, besides costs, or in an amount equal to the value of the property which has been or is about to be attached; in which case you will take such undertaking, and hereof make due and legal service and return.

Witness Rob't H. Wilson, judge and clerk of said court, and the seal thereof at Ouray, this 23d day of May, A. D. 1895.

ROB'T H. WILSON,
Judge and Clerk.

[SEAL.]

By MARY F. WILSON,
Deputy Clerk.

STATE OF COLORADO, } *ss* :
Ouray County, }

I do certify that I have duly executed the within writ on this 23rd day of May, A. D. 1895, by levying upon and attaching all the right, title, interest, claim and demand and equity of redemption of the Cosmopolitan Mining Company in and to the following-described real property to wit: The Yellow Rose lode, the Crusader lode, the Norma lode, the Talisman lode, the Hidden Treasure lode, the Gertrude lode and the Emily lode mining claims, situated in Imogene basin, Mt. Sneffles mining district, County of Ouray and State of Colorado;

and also the mill sites and each and every of them in said basin, district, county and State, and to said lodes and each and every of them belonging, which said lodes and mill sites are more accurately described in detail and identified by metes and bounds in the books of record in and for the recorder's office of the said County of Ouray and the State of Colorado, to which records reference is hereby made.

And I further certify that I have further executed the within writ by delivering a true copy hereof to and filing the same with the clerk and recorder of said Ouray County.

MAURICE CORBETT, *Sheriff.*

(The foregoing document was duly endorsed.)

STATE OF COLORADO, } *ss:*
County of Ouray, }

In the County Court.

P. H. FENNELL,
Plaintiff,
vs.
COSMOPOLITAN MINING COMPANY,
a Corporation, *Defendant.*
} Summons.

The People of the State of Colorado to Cosmopolitan Mining Co. the defendant above-named, Greeting:

You are hereby required to appear in an action brought against you by the above-named plantiff in the County Court of Ouray County, State of Colorado, and answer the complaint therein within twenty days after the service hereof, if served within this county, or if served out of this county, or by publication, within thirty days after the service hereof, exclusive of the day of service; or judgment by default will be taken against you according to the prayer of the complaint. And if a copy of the complaint in the above-entitled action be not served with this summons or if the service hereof be made out of this State, then ten days

additional to the time hereinbefore specified for appearance and answer will be allowed before the taking of judgment by default as aforesaid.

The said action is brought to recover from the defendant the sum of $117.50, and interest thereon from the 1st day of August, 1894, at 8 per cent per annum, amount alleged to be due the plaintiff from the defendant to the plaintiff for and upon an account for work and labor done and performed by said plaintiff for defendant, at defendant's special instance and request, between the 1st day of June, 1894, and the 1st day of August 1894, in the sum of $58.75; and also the sum of $58.75 due to one John Dowd for and upon an account for work and labor done and performed as aforesaid between the dates aforesaid and by the said John Dowd assigned to this plaintiff for collection, as will more fully appear from the complaint in said action, to which reference is here made.*

And you are hereby notified that if you fail to appear, and to answer the said complaint as above required, the said plaintiff will take judgment against you by default in accordance with the prayer of said complaint.

Given under my hand and the seal of said court at Ouray in said County, this 23d day of May, 1895.

[SEAL.] ROB'T H. WILSON,
Judge and Clerk,
By MARY F. WILSON,
Deputy Clerk.

(Index.) *A copy of which is hereto attached.

STATE OF COLORADO, } ss:
County of San Miguel, }

I do hereby certify that I have duly served the within summons, together with a copy of the complaint in the within-stated action, on this 27th day of May, A. D. 1895, by personally delivering a true copy of said

summons, together with a copy of the original complaint in the action therein mentioned, thereto attached, to J. M. Jardine, *he being the duly authorized agent* for the within-named defendant company.

J. C. RUTAN, *Sheriff.*

(The foregoing document was fully endorsed.)

STATE OF COLORADO, Ouray County, } *ss*:

In the County Court Within and for the County of Ouray, in the State of Colorado.

P. H. FENNELL, *Plaintiff*, *vs.* COSMOPOLITAN MINING COMPANY, a Corporation, *Defendant.* } Writ of Attachment.

The People of the State of Colorado to the Sheriff of the County of San Miguel, Greeting:

Whereas the above-entitled action was commenced in the County Court in and for the said County of Ouray in the State of Colorado, by the plaintiff in the said action to recover from the defendant Cosmopolitan Mining Company, in the said action, the sum of one hundred seventeen and $\frac{50}{100}$ dollars lawful money of the United States, besides interest at the rate of 8 per cent per annum from the first day of August, A. D. 1894, and costs of suit; and the necessary affidavit and undertaking herein having been filed as required by law;

Now, we do therefore command you, the said sheriff, that you serve a copy hereof on the above defendant, if it be found in your county, and also attach and safely keep all the property of said defendant within your said county not exempt from execution or so much thereof as may be sufficient to satisfy the said plaintiff's demand, as above, and in the affidavit herein mentioned unless the said defendant deposit with you the amount or give you security by an undertaking of at least two sufficient sureties in an amount sufficient to satisfy

such demand, besides costs, or in an amount equal to the value of the property which has been or is about to be attached, in which case you will take such undertaking and hereof make due and legal service and return.

Witness Robert H. Wilson, Judge and Clerk of said court, and the seal thereof, at Ouray aforesaid, this 23rd day of May, A. D. 1895.

[SEAL.] (Signatures next page.)

ROBERT H. WILSON,
Judge and Clerk,
By MARY F. WILSON,
Deputy Clerk.

STATE OF COLORADO, } *ss*:
San Miguel County, }

I do hereby certify that I have duly executed the within writ on this 27th day of May, A. D. 1895, by delivering a true copy of same to J. M. Jardine, *he being the duly authorized* agent for the within-named defendant company.

J. C. RUTAN, *Sheriff.*

(The foregoing document was duly endorsed.)

P. H. FENNELL,
Plaintiff,
vs.
THE COSMOPOLITAN MINING CO.,
a Corporation, *Defendant.*
} 1440. Default.

Now on this 10th day of July, 1895, plaintiff, by his counsel, Emerson & Bradshaw, appeared and filed his application for default against the above-named defendant, and it appearing to the Court that summons has been served upon one J. M. Jardine, the *heretofore* duly authorized and acting agent for said company, and that said defendant has made no appearance herein; and it further appearing that the complaint of plaintiff is duly verified and that the time for the appearance of said defendant has expired; it is therefore ordered that default do and the same hereby does enter against said defendant.

P. H. FENNELL,
Plaintiff,
vs.
THE COSMOPOLITAN MINING CO.,
a Corporation, *Defendant.*
} 1440. Judgment.

Now on this day appeared Emerson & Bradshaw, attorneys for plaintiff, the said defendant appearing not, and moved the Court that the said cause come on for a hearing upon its merits; whereupon the evidence on behalf of plaintiff was introduced before the Court without the intervention of a jury. And it appearing to the Court that the said defendant is justly indebted to the said plaintiff in the sum of 126 and $\frac{1}{100}$ dollars, including interest to date; and it further appearing that default has been duly entered herein in favor of the plaintiff and against the said defendant,

It is therefore ordered by the Court after being fully advised in the premises and after having heard the testimony of the said plaintiff, introduced herein in open court that the said plaintiff, P. H. Fennell, do have and recover of and from the said defendant, the Cosmopolitan Mining Company, the just and full sum of one hundred twenty-six and $\frac{1}{100}$ dollars, together with his costs therein expended, taxed at 22$\frac{11}{100}$ dollars. And it is further ordered that the attachment herein be sustained. For which let special execution issue. ROBERT H. WILSON, *Judge.*

STATE OF COLORADO,
Ouray County,
} *ss:*

In the County Court in and for said County.

P. H. FENNELL,
Plaintiff,
vs.
COSMOPOLITAN MINING COMPANY,
Defendant.
} Praecipe for Execution.

To Rob't H. Wilson, Judge and Clerk of said Court.

You will please issue special execution in the above.

entitled cause and this shall be your warrant therefor.
Dated this 23rd day of July, A. D. 1895.

(Signed) EMERSON & BRADSHAW,
Plaintiff's Attorneys.

(The foregoing document was duly endorsed.)

STATE OF COLORADO, } ss:
Ouray County, }

The People of the State of Colorado to the Sheriff of Ouray County, Greeting:

Whereas, by virtue of a certain writ, of attachment, issued out of our County Court on the 23d day of May, A. D. 1895, and that on the 23d day of May, 1895, you levied upon the Yellow Rose lode, Crusader lode, Norma lode, Talisman lode, Hidden Treasure lode, Gertrude lode, and the Emily lode, all situated in Imogene Basin, Mt. Sneffles mining district, county and State aforesaid all *all* mill sites thereunto belonging, more particularly described in the location certificates thereof on record with the clerk and recorder of said County and State as the property of The Cosmopolitan Mining Co., as appears by your certificate of levy, filed and recorded in this office; and whereas, afterward, to wit, on the 10th day of July, A. D. 1895, by the consideration of our County Court, P. H. Fennell recovered judgment against the said The Cosmopolitan Mining Co., for the sum of one hundred and twenty-six and $\frac{12}{100}$ dollars damages, and also the further sum of twenty-two and $\frac{12}{100}$ dollars costs of suit, as appears of record.

We therefore command you, that you immediately proceed to sell the property by you levied upon, as hereinbefore described, or so much thereof as is necessary to make the aforesaid sums of money, with interest on said judgment from the day of the rendition of the same; and have the said money ready, as soon as may be, to render unto the said court for adjustment among the several judgment-creditors in proportion to

the amount of their respective claims according to law.

Hereof fail not, and make return to this writ, with your doings endorsed thereon in ninety days from the date hereof.

Witness Rob't H. Wilson, Judge and Clerk of our said County Court, and seal thereof, at Ouray, this 23d day of July, A. D. 1895.

[SEAL.] ROB'T H. WILSON,
Judge and Clerk.

STATE OF COLORADO, } *ss*:
Ouray County, }

I hereby return the within execution fully satisfied in accordance with my return made on the execution issued in the case of the A. W. Begole Mercantile Company *vs.* The Cosmopolitan Mining Company, this 30th day of September, 1895.

(Signed) MAURICE CORBETT,
Sheriff.

(The foregoing document was duly endorsed.)

WILLIAM C. FULTON,
vs.
COSMOPOLITAN MINING COMPANY.

STATE OF COLORADO, } *ss*:
County of Ouray, }

In the County Court.

WILLIAM C. FULTON, *Plaintiff*,
vs.
THE COSMOPOLITAN MINING COMPANY, a Corporation, *Defendant*. } Complaint.

Plaintiff complains and alleges:

1st. That the amount involved in this action does not exceed the sum of two thousand dollars.

2nd. *That the defendant is a corporation duly organized under the laws of*

III. That on the 4th of November, 1893, at Ouray County aforesaid, the defendant was indebted to one

John Lillar, in the sum of nine hundred twenty-two and ⅘ dollars, upon an account for work and labor performed in and about the working and development of the Hidden Treasure mine belonging to the defendant upon a contract express * * * that said work and labor and material was reasonably worth, and the defendant agreed to pay for the same, the said sum of $922.80.

IV. That prior to the beginning of this action the said claim and account was, for value, assigned to the plaintiff.

V. That the defendant has not paid the same nor any part thereof.

Whereof, plaintiff prays judgment for the said sum of $922.80 with interest thereon from the said 4th day of November, 1893, and for costs of suit.

(Signed) STORY & STEVENS,
Attorneys for Plaintiff.

(The foregoing complaint was duly verified and endorsed.)

STATE OF COLORADO, }
County of Ouray, } *ss:*

In the County Court Within and for the County of Ouray Aforesaid, the Term, A. D. 1895.

WILLIAM C. FULTON,
Plaintiff,
vs.
THE COSMOPOLITAN MINING COMPANY,
a Corporation, *Defendant.*

William C. Fulton of said county, being duly sworn, doth depose and say that the defendant, The Cosmopolitan Mining Company, against whom the said William C. Fulton is about to sue out an attachment, is indebted to him in a sum not exceeding ten hundred dollars, to wit, the sum of nine hundred twenty-two and ⅘ dollars and that the said demand is and unpaid on an express contract, and that the said sum of

$922.80 is due from defendant to plaintiff, for work and labor performed by John Lillar, for said defendant at its request; that the said claim was by the said John Lillar for value assigned to the plaintiff; that said sum is *do* on a written order of the agent of said corporation, for the direct and unconditional payment of money; *that the defendant is a foreign corporation.*

(Signed) W. C. FULTON.

Sworn and subscribed to before me, this 25th day of May, A. D. 1895.

[SEAL.] ROBERT H. WILSON,
County Judge and Clerk Co. Come.

(The foregoing paper was duly endorsed.)

STATE OF COLORADO, } *ss:*
Ouray County, }

In the County Court in and for the County of Ouray, in the State Aforesaid.

WM. C. FULTON, *Plaintiff,* *vs.* THE COSMOPOLITAN MINING COMPANY, a Corporation, *Defendant.*	Undertaking on Attachment.

Whereas, the above-named plaintiff has commenced, or is about to commence an action in the County Court in and for the County of Ouray, in the State aforesaid, against the above-named defendant, upon a contract for the direct payment of money, claiming that there is due to the said plaintiff from the said defendant the sum of nine hundred twenty-two and 80/100 dollars, lawful money of the United States, besides interest, and the plaintiff is about to apply for an attachment against the property of the said defendant as security for the satisfaction of any judgment that may be recovered therein.

Now, therefore, we, the undersigned, residents of the County of Ouray, State of Colorado, in consideration of the premises, and of the issuing of said attachment, do jointly and severally undertake in the sum of eighteen

hundred and fifty dollars and promise to the effect, that if the said defendant shall recover judgment in said action, or if the said court shall finally decide that the said plaintiff was not entitled to an attachment, the said plaintiff will pay all costs that may be awarded to the said defendant Company and all damages which it may sustain by reason of the wrongful suing out of the said attachment, not exceeding the sum of eighteen hundred and fifty dollars.

Dated this 25th day of May, A. D. 1895.

W. C. FULTON.
E. H. POWELL.
J. C. MARSH.

(On the back of the foregoing document was the oath as to the worth of sureties, not filled out, but signed "E. H. Powell" and "J. C. Marsh." The document was also endorsed.)

STATE OF COLORADO, } *ss:*
County of Ouray, }

In the County Court.

WILLIAM C. FULTON, *Plaintiff,* *vs.* THE COSMOPOLITAN MINING COMPANY, a Corporation, *Defendant.* } Summons.

The People of the State of Colorado to the Cosmopolitan Mining Company, a Corporation, the defendant above-named, Greeting:

You are hereby required to appear in an action brought against you by the above-named plaintiff in the County Court of Ouray County, State of Colorado, and answer the complaint therein within twenty days after the service hereof, if served within this county, or if served out of this county or by publication, within thirty days after the service hereof, exclusive of the day of service; or judgment by default will be taken against you according to the prayer of the complaint.

And if a copy of the complaint in the above-entitled action be not served with this summons, or if the service hereof be made out of this State, then ten days additional to the time hereinbefore specified for appearance and answer will be allowed before the taking of judgment by default as aforesaid.

The said action is brought to recover from you the sum of $922.80 upon an account for work and labor performed by one John Lillar, at your request, and for which you agreed to pay said sum of $922.80 which said account has been for value, assigned to the plaintiff, as will more fully appear from the complaint in said action to which reference is here made, a copy of which is attached hereto.

And you are hereby notified that if you fail to appear and to answer the said complaint as above required, the said plaintiff will take default and judgment against you according to the prayer of the complaint.

Given under my hand and the seal of said court at Ouray in said county, this 13th day of June, A. D. 1895.

[SEAL.] **ROB'T H. WILSON,**
Judge and Clerk.
MARY F. WILSON,
Deputy Clerk.

STATE OF COLORADO, }
County of San Miguel, } *ss:*

I do hereby certify that I have duly served the within summons, together with a copy of the complaint in the within-stated action on this 22d day of June, A. D. 1895, by personally delivering a true copy of said summons, together with a copy of the original complaint in the action therein mentioned, thereto attached, to the within-named defendant, J. M. Jardine, *he being the duly authorized agent* for the within-named defendant company.

J. C. RUTAN, *Sheriff.*

(The foregoing document was duly endorsed.)

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STATE OF COLORADO, } ss:
County of Ouray. }

In the County Court Within and for the County of Ouray, State of Colorado.

WM. C. FULTON, *Plaintiff*,
vs.
THE COSMOPOLITAN MINING COMPANY, a Corporation, *Defendant*.

Writ of Attachment.

The People of the State of Colorado to the Sheriff of the said County of *Ouray*, Greeting:

Whereas, the above-entitled action was commenced in the County Court in and for the said County of Ouray, in the State of Colorado, by the plaintiff in the said action, to recover from the defendant, The Cosmopolitan Mining Co., a corporation, in the said action, the sum of nine hundred twenty-two and ⅔ dollars, lawful money of the United States, besides interest at the rate of per cent per from the day of , A. D. 189 , and costs of suit; and the necessary affidavit and undertaking herein having been filed as required by law;

Now, we do therefore command you, the said sheriff, that you serve a copy hereof on the above defendant, if *he* be found in your county, and also attach and safely keep all the property of said defendant, The Cosmopolitan Mining Co., a corporation, within your said county, not exempt from execution, or so much thereof as may be sufficient to satisfy the said plaintiff's demand, as above, and in the affidavit herein mentioned, unless the said defendant deposit with you the amount or give you security by an undertaking of at least two sufficient sureties, in an amount sufficient to satisfy such demand, besides costs, or in an amount equal to the value of the property which has been or is about to be attached; in which case you will take such undertaking; and hereof make due and legal service and return.

Witness Rob't H. Wilson, Judge and Clerk of said Court, and the seal thereof, at Ouray, this 13th day of June, A. D. 1895.

[SEAL.] ROB'T H. WILSON,
Judge and Clerk,
By MARY F. WILSON,
Deputy Clerk.

STATE OF COLORADO, } *ss:*
San Miguel County, }

I do hereby certify that I have duly executed the within writ on this 22d day of June, A. D. 1895, by delivering to J. M. Jardine, a true copy of same, *he being the duly authorized agent* for the within-named defendant company.

J. C. RUTAN, *Sheriff.*

(The foregoing document was duly endorsed.)

W. C. FULTON,
vs.
THE COSMOPOLITAN MINING COMPANY. } 1443. Default.

Now on this 26th day of July, 1895, plaintiff by his counsel, Story & Stevens, appeared and filed his application for default herein against the above-named defendant; and it appearing to the court that summons has been served upon one J. M. Jardine, the *heretofore* authorized and acting agent for said company; and that the said defendant has made no appearance herein; and it further appearing that the complaint of plaintiff herein is duly verified, and that the time for appearance of said defendant has expired; it is therefore ordered that default do and the same does hereby enter against said defendant.

W. C. FULTON,
vs.
THE COSMOPOLITAN MINING CO. } 1443. Judgment.

Now on this day appeared Story & Stevens, attorneys for plaintiff, the said defendant appearing not, and

moved the court that the said cause come on for hearing upon its merits; whereupon the evidence on behalf of plaintiff was introduced before the court without the intervention of a jury; and it appearing to the court that the said defendant is justly indebted to the said plaintiff in the sum of 1,049 and $\frac{75}{100}$ dollars including interest to date. And it further appearing that default has been duly entered in favor of plaintiff and against said defendant.

It is therefore ordered by the court, after being fully advised in the premises, and after having heard the testimony of the said plaintiff introduced herein in open court that the said plaintiff, W. C. Fulton, do have and recover of and from the said defendant, the Cosmopolitan Mining Company, the just and full sum of ten hundred forty-nine and $\frac{75}{100}$ dollars, together with his costs herein taxed at —— dollars. And it is further ordered that the attachment herein be sustained. For which let special execution issue.

STATE OF COLORADO, } ss:
Ouray County, }

The People of the State of Colorado to the Sheriff of Ouray County, Greeting:

We command you, that of the lands and tenements, goods and chattels, of The Cosmopolitan Mining Company, defendant, in your county, you cause to be made the sum of one thousand and forty-nine and $\frac{75}{100}$ dollars, which W. C. Fulton, plaintiff, lately in the County Court of said Ouray County, at a term thereof begun and held at Ouray in said county, on the 26th day of July, A. D. 1895, recovered against the said defendant, and which by the said Court was adjudged to the said plaintiff for his damages by him in his behalf sustained, together with interest upon said judgment from the date of the recovery thereof until the same is paid at the rate of 8 per cent per annum. And also, the further sum of fifteen dollars and forty cents, which were adjusted to

the said plaintiff for his costs and charges in that behalf expended, whereof the said defendant is convicted, as appears to us of record. And have you these moneys ready to render to the said court for damages for adjustment among the several judgment-creditors in proportion to the amount of their respective claims and costs aforesaid and make return of this writ, with an endorsement thereon in what manner you shall have executed the same, within ninety days of the date hereof.

Witness Rob't H. Wilson, judge and clerk of said court, and the seal thereof, at Ouray, in said county, this 27th day of July, A. D. 1895.

ROB'T H. WILSON,
Judge and Clerk.

STATE OF COLORADO, } *ss:*
Ouray County, }

I hereby return the within execution fully satisfied in accordance with my return made on the execution issued in the case of The A. W. Begole Mercantile Company *vs.* The Cosmopolitan Mining Company, this 30th day of September, 1895.

(Signed) MAURICE CORBETT,
Sheriff.

(The foregoing document was duly endorsed.)

THOMAS F. WALSH,
vs.
COSMOPOLITAN MINING CO. *et al.*

STATE OF COLORADO, } *ss:*
County of Ouray, }

In the District Court of the Seventh Judicial District of the State of Colorado, Sitting Within and for the County of Ouray Aforesaid.

THOMAS F. WALSH, *Plaintiff,*
vs.
THE COSMOPOLITAN MINING COMPANY and J. M. JARDINE, *Defendants.*

Be it remembered, that on the first day of March,

A. D. 1897, there was filed in the office of the Clerk of said District Court in said cause a certain complaint in words and figures following, to wit:

STATE OF COLORADO, } ss:
County of Ouray, }

In the District Court thereof.

THOMAS F. WALSH, *Plaintiff*,
vs.
THE COSMOPOLITAN MINING COMPANY and J. M. JARDINE, *Defendants*.

Plaintiff complains and alleges:

First. *That the defendant is a corporation organized under the laws of the State of Maine, for the purpose, among others, of carrying on a mining business in the County of Ouray and State of Colorado, and by certificate dated December 16, 1885, recorded in Book C-1, page 291, on January 21, 1886, the said J. M. Jardine afterwards was, as required by the laws of the State of Colorado, duly appointed as the authorized agent of the defendant company, upon whom process might be served.*

Second. That during the months of April and May A. D. 1895, the A. W. Begole Mercantile Company, John Ashenfelter, P. H. Fennell *et al*, commenced their certain actions in the County Court of Ouray County aforesaid against the defendant company above named, and in said actions summons were duly issued and the necessary affidavits and undertakings having been duly given, writs of attachment were duly issued in each of said actions and levied upon the property hereinafter described, and in said actions and each of them the summons and writs of attachment were duly served upon the defendant company *by delivering the same to the* said J. M. Jardine *as the agent of the defendant company.*

Third. That in said actions, and each of them, judgments were duly had and entered in said court against

the defendant company, and on the 23d day of July, 1895, special execution was duly issued out of said County Court in that certain action in which The A. W. Begole Mercantile Company was plaintiff and The Cosmopolitan Mining Company was defendant, and said property hereinafter described was duly levied upon, advertised and sold by the then sheriff of Ouray County to one J. C. Marsh as trustee, and a certificate of purchase duly issued to him.

Fourth. That afterwards, the said Marsh, for a valuable consideration, duly assigned said certificate of purchase to one Stephen A. Osborn, and on May 25, 1896, the time of redemption having expired, the then sheriff of Ouray County duly executed and delivered to Stephen A. Osborn a sheriff's deed for the premises hereinafter described.

Fifth. That on June 16, 1896, the plaintiff herein purchased from the said Stephen A. Osborn for the sum of ten thousand ($10,000) dollars, all of the premises in said sheriff's deed mentioned, to-wit: The Yellow Rose mining claim; the Crusader lode mining claim; the Talisman lode mining claim; the Hidden Treasurer lode mining claim; the Gertrude lode mining claim, and the Emily lode mining claim, together with the several mill sites patented in connection with said lode mining claims, and each of them, all situate in Imogene basin in Mt. Sneffles mining district, in the County of Ouray and State of Colorado, being the premises particularly described in that certain deed of conveyance executed by one Thomas F. Wentworth to the Cosmopolitan Mining Company on July 8, 1890, which deed is of record in the office of the clerk and recorder of Ouray County aforesaid in Book 57 at page 240, as will appear by said deed conveying said premises from the said Stephen A. Osborn to the plaintiff herein, recorded in Book 62 at page 320, on the 30th day of November, 1896, in the office of the clerk and recorder of

Ouray County aforesaid, being the premises levied upon in the said several writs of attachment issued against the Cosmopolitan Mining Company aforesaid, and duly sold by the sheriff on August the 24th, 1895, as above set forth.

Sixth. That the plaintiff is now in the actual peaceable possession of the above-described premises, and is the owner in the fee thereof, and is engaged in working and developing the mining claims aforesaid, and is expending thereon divers large sums of money for the purpose of proving and establishing their value as mining claims aforesaid.

Seventh. That notwithstanding the proceedings in all and each of said actions in said county court were in all respects lawful and valid and within the jurisdiction of said court, and notwithstanding no appeal was taken, or bill of exceptions filed, and the time for so doing has long since elapsed, the defendants and each of them pretend and claim that they still hold some interest in said real property above described, adverse to the said claim of the plaintiff and thereby prevent the plaintiff from obtaining the necessary assistance and capital required for the purpose of developing the same.

Wherefore plaintiff prays judgment:

First. That said defendants and each of them may be required to come into court and specify the nature of their claims and have them finally adjudicated.

Second. That on the final hearing it may be determined that said defendants have not, nor have either of them, any interest, right, title, claim or demand to the premises above described, or any part thereof.

Third. For general relief.

(Signed) STORY & STEVENS,
Attorneys for Plaintiff.

(Above is duly verified and endorsed.)

Be it further remembered, that on the 25th day of

March, A. D. 1897, there was filed in the office of the clerk of said District Court, in said cause, a certain summons, which, with the return endorsed thereon, is in words and figures following, to wit:

STATE OF COLORADO, } ss:
County of Ouray, }

In the District Court.

THOS. F. WALSH, *Plaintiff*,
vs.
THE COSMOPOLITAN MINING CO., and J. M. JARDINE, *Defendants*. } Summons.

The People of the State of Colorado to The Cosmopolitan Mining Company and J. M. Jardine, the defendants above-named, Greeting:

You are hereby required to appear in an action brought against you by the above-named plaintiff in the District Court of Ouray County, State of Colorado, and answer the complaint therein within twenty days after the service hereof, if served within this county; or, if served out of this county, or by publication, within thirty days after the service hereof, exclusive of the day of service; or judgment by default will be taken against you according to the prayer of the complaint. And if a copy of the complaint in the above-entitled action be not servedwith this summons, or if the service hereof be made out of this State, then ten days additional to the time hereinbefore specified for appearance and answer will be allowed before the taking of judgment by default as aforesaid.

The said action is brought to obtain a decree quieting the title of plaintiff to the "Yellow Rose," "Crusader," "Talisman," Hidden Treasure, Gertrude and Emily lode mining claims, together with the several mill sites patented in connection with said lode mining claims all of said mining claims being in Imogene basin in Mt. Sneffles Mining District in the County of Ouray and State of

Colorado, as will more fully appear from the complaint in said action to which reference is here made. And * a copy of which is hereto attached. And you are hereby notified that if you fail to appear and to answer the said complaint as above required, the said plaintiff will enter a default against you and apply to the court for the relief demanded in the complaint.

Given under my hand and the seal of said court, at Ouray, in said County, this 1st day of March, A.D.1897.

[SEAL.] (Signed)

JAS. W. ABBOTT, *Clerk*,

By JOHN MAQUILKEN, *Deputy*

(Index.) * A copy of which is hereto attached.

(On the back of the foregoing was the following:)

STATE OF COLORADO, } *ss.*
County of Ouray. }

I do hereby certify that I have duly served the within summons * together with a copy of the complaint in the within-stated action, on this 4th day of March, A. D. 1897, by personally delivering a true copy of said summons, * together with a copy of the original complaint in the action therein mentioned, thereto attached, to the within-named defendants the Cosmopolitan Mining Company and the said J. M. Jardine, at Ouray, in said County. I further certify that the service of the summons and complaint upon the Cosmopolitan Mining Company, was made by delivering to John M. Jardine, *the duly authorized agent of the defendant company and designated by it as the person upon whom service should be made*, a copy of said summons with a copy of the complaint attached specially for said defendant company.

(Signed) W. J. BENTON, *Sheriff*,

By JOHN MAQUILKEN, *Under Sheriff*.

(Index) * Erase if copy of complaint is not served.

(The foregoing document was duly endorsed.)

Be it further remembered, that on the 5th day of March, A. D. 1897, there was filed in the office of the clerk of said District Court, in said cause, a certain answer, in words and figures following, to wit:

STATE OF COLORADO, } ss:
County of Ouray, }

In the District Court.

THOMAS F. WALSH,
Plaintiff,
vs.
THE COSMOPOLITAN MINING COMPANY,
and J. M. JARDINE, *Defendants*.

Now comes the defendant, J. M. Jarnine, and for answer to the complaint filed herein, says:

FIRST. That the only interest he has had in this matter grows out of the fact that the summons in each of the original actions in the complaint mentioned was served upon him as agent of the defendant company, and that upon said writ being so served upon him, he duly mailed the same to the president of the defendant company, with postage fully paid, in envelopes with return card printed thereon. That said letters were not returned to this defendant, nor was he instructed in any manner by the defendant company, or its officers to defend said actions, nor did he have any knowledge of facts on which said actions could be defended, *and therefore*, allowed judgments in said action to be taken without interposing any defence on the merits. That since the entry of said judgment and the sale of the premises in the complaint thereunder he has not claimed, nor pretended to claim any interest in said premises adverse to the plaintiff.

Wherefore he prays to be dismissed with his costs.

(Signed) J. M. JARDINE, *Pro Se.*

(Above document is duly verified and endorsed.)

Be it further remembered, that on the 25th day of March, A. D. 1897, there was filed in the office of the clerk of said court in said cause, a certain præcipe which is in words and figures following, to wit:

STATE OF COLORADO, } ss:
County of Ouray, }

In the District Court within and for said County and State.

THOMAS T. WALSH *Plaintiff*,
vs.
THE COSMOPOLITAN MINING COMPANY, and J. M. JARDINE, *Defendants*.

To——————————Clerk of said Court:

You will please enter the default of the defendant, The Cosmopolitan Mining Company, in the above entitled cause, and this shall be your warrant therefor.

Dated March 25, 1897.

(signed) STORY & STEVENS,
Attorneys for Plaintiff.

(The above document was duly endorsed.)

Be it further remembered, that on the 25th day of March, 1897, there was entered in the default record in the office of the Clerk of said District Court, in said cause, a certain order in words and figures following, to wit:

THOMAS F. WALSH, *Plaintiff*,
vs.
THE COSMOPOLITAN MINING COMPANY and J. M. JARDINE, *Defendants*. } 957. In vacation.

In this action the defendant The Cosmopolitan Mining Company, having been regularly served with process and having failed to appear and answer the plaintiff's complaint in this behalf, the legal time for answering having expired and no answer, motion or demurrer having been filed; upon application to the clerk by Story & Stevens, Esquires, attorneys for said plaintiff,

the default of said defendant, The Cosmopolitan Mining Company, in the premises is hereby duly entered according to law.

Done in vacation, this 25th day of March, A. D. 1897, by the clerk of said court.

Attest :

JAMES W. ABBOTT, *Clerk.*
By F. W. ABBOTT, *Deputy.*

Convenement.

The regular May term of the District Court of the Seventh Judicial District of the State of Colorado, sitting within and for the County of Ouray, convenes at the court-house in the city of Ouray on the 11th day of May, A. D. 1897, there being present the following officers :

HON. W. H. GABBERT, *Judge.*
W. J. BENTON, *Sheriff.*
JAMES W. ABBOTT, *Clerk,*
By F. W. ABBOTT, *Deputy.*

Be it remembered that on the 11th day of May, A. D. 1897, it being one of the regular juridicial days of the May term, A. D. 1897, of said District Court, to wit, the first day of said term, the following order and decree was entered of record in said Court in said cause, to wit :

THOMAS *H.* WALSH
vs.
THE COSMOPOLITAN MINING COMPANY and J. M. JARDINE. } 957.

Now on this day this cause comes on to be heard by the court upon the verified complaint of the plaintiff, the answer of the defendant J. M. Jardine, and the default of the defendant, The Cosmopolitan Mining Company, duly entered herein for the failure of the said defendant to plead as required by law, after due service of summons upon it in manner and form as by law provided.

And thereupon the said plaintiff was duly sworn as a witness in said cause. And the court having heard

the testimony given by him and inspected the records, deeds, and documents offered in evidence, doth find:

FIRST. That the defendant is a corporation organized under the laws of the State of Maine for the purpose, among others, of carrying on a mining business in the County of Ouray and State of Colorado, and by certificate dated December 16, 1885, recorded in Book C-1, page 291, on January 21, 1896, the said J. M. Jardine afterwards was, as required by the laws of the State of Colorado, duly appointed as the authorized agent of the defendant company upon whom process might be served.

Second. That during the months of April and May, A. D. 1895, The A. W. Begole Mercantile Company, John Ashenfelter, P. H. Fennell, *et al.*, commenced their certain actions in the County Court of Ouray County aforesaid, against the defendant company above named, and in said actions summons were duly issued and the necessary affidavits and undertakings having been duly given, writs of attachment were duly issued in each of said actions and levied upon the property hereinafter described, and in said actions and each of them the said summons and writs of attachment were duly served upon the defendant company by delivering the same to the said J. M. Jardine as the agent of the defendant company.

Third. That in said actions, and each of them, judgments were duly had and entered in said court against the defendant company and on the 23d day of July, 1895, special execution was duly issued out of said County Court in that certain action in which The A. W. Begole Mercantile Company was plaintiff, and the Cosmopolitan Mining Company was defendant, and said property hereinafter described was duly levied upon, advertised and sold by the then sheriff of Ouray County to one J. C. Marsh, as trustee, and a certificate of purchase duly issued to him.

Fourth. That afterwards, the said Marsh, for a valuable consideration, duly assigned said certificate of purchase to one Stephen A. Osborn, and on May 25th, 1896, the time of redemption having expired, the then sheriff of Ouray County duly executed and delivered to Stephen A. Osborn a sheriff's deed for the premises hereinafter described.

Fifth. That on June 16, 1896, the plaintiff herein purchased from the said Stephen A. Osborn for the sum of ten thousand ($10,000) dollars all of the premises in said sheriff's deed mentioned, to wit: The Yellow Rose lode mining claim; the Crusader lode mining claim; the Talisman lode mining claim; The Hidden Treasure lode mining claim; the Gertrude lode mining claim, and the Emily lode mining claim, together with the several mill sites patented in connection with said lode mining claims, and each of them, all situate in Imogene basin in Mt. Sneffles mining district, in the County of Ouray and State of Colorado, being the premises particularly described in that certain deed of conveyance executed by one Thomas F. Wentworth to The Cosmopolitan Mining Company on July 8, 1890, which deed is of record in the office of the clerk and recorder of Ouray County, in Book 57, at page 240, as will appear by said deed conveying said premises from the said Stephen A. Osborn to the plaintiff herein, recorded in Book 62, at page 326, on the 30th day of November, 1896, in the office of the clerk and recorder of Ouray County aforesaid, and being the premises levied upon in the said several writs of attachment issued against The Cosmopolitan Mining Company aforesaid, and duly sold by the sheriff on August 24, 1895, as above set forth.

Sixth. That the plaintiff is now in the actual peaceable possession of the above described premises, and is the owner in fee thereof, and is engaged in working and developing the mining claims aforesaid, and is expending thereon divers large sums of money for the

purpose of proving and establishing their value as mining claims aforesaid.

Seventh. That notwithstanding the proceedings in all and each of said actions in said county court were in all respects lawful and valid and within the jurisdiction of said court, and notwithstanding no appeal was taken, or bill of exceptions filed and the time for so doing has long since elapsed, the defendant, The Cosmopolitan Mining Co., pretends and claims that it still holds some interest in said real property above described, adverse to the claim of the plaintiff and thereby prevents the plaintiff from obtaining the necessary assistance and capital required for the purpose of developing the same.

It is therefore considered, adjudged, and decreed by the court that the said defendants have not, nor have either of them any right title interest, claim or demand in or to any part of the premises above described, and that the pretended claim of the defendant, The Cosmopolitan Mining Company, in and to said premises is wholly without right, or justification in law. That the plaintiff is the owner and in the possession of the premises and mining claims above described and entitled to the quiet and peaceable possession of said mining claims and each of them.

It is further considered that the plaintiff pay the costs of this proceeding. And thereupon on application of the plaintiff, permission is given to him to withdraw the documentary evidence offered by him on the trial of this cause.

STORY & STEVENS.

Service on Foreign Corporations.

"A summons shall be served as follows:

"Ninth. If the action be against a foreign corporation or joint stock company or association, organized under the laws of another State or territory *and doing business within this State*, the summons shall be served by delivering a copy to any agent of such corporation, company or association *found within the county* in which the action is brought, if no such agent be found in such county then by delivering a copy of the summons to any stockholder *who may be found in the county*."

Sec. 38, Subdivision Ninth, Mills' Annotated Code.

Service Outside County in Certain Actions.

Sec 38*b*. "All acts or parts of acts inconsistent with the provisions of this act are hereby repealed; but nothing herein contained shall be held to repeal any provision of law, now in force, which authorizes or permits a summons to be served in any other county of the State than that which the action is brought."

L. 91, p. 83, 3, Amending Code, 1887, 38.

Appointment of Process Agent and Designation of Place of Business.

Sec. 499. "Foreign corporations shall, before they are authorized or permitted to do business in this State, make and file a certificate signed by the president and secretary of such corporation, duly acknowledged, with the Secretary of State, and in the office of the Recorder of Deeds of the county in which such business is carried on, designating the principal place where the business of such corporation shall be carried on in this State, and an authorized agent or agents in this State residing at its principal place of business upon whom process may be served."

Sec. 499, Mills' Annotated Statutes.

Title of Code.

The law enacting the present Code of Colorado has the following title:

"AN ACT

(For an Act) to provide a code of procedure in civil actions for courts of record in the State of Colorado, and to repeal all acts inconsistent therewith."

Mills' Ann. Code, page 1.

Service by Publication.

Section 41 of the Colorado Code, so far as it is pertinent, reads as follows:

Sec. 41. "Service by publication shall be allowed only after summons issued and return thereon made, that the defendant, after diligent search cannot be found. After such return, not less than ten days after issue of summons, publication shall be made by order of the clerk of the proper court, but shall be made only in cases of attachment, forclosure, claims and delivery, or other proceedings where specific property is to be affected, or the procedure is such as is known as a proceeding *in rem*. After return is made, as aforesaid, the case being such as hereinbefore mentioned, the plaintiff or one of the plaintiffs may file in the office of the proper clerk an affidavit stating that the defendant resides out of the State, or has departed from the State without the intention of returning, or concealed himself to avoid the service of process and giving his post office address, if known, or stating his post office address is not known to affiant, whereupon the order of publication shall be made by the clerk. The order shall direct the publication to be made in a public newspaper published in the county. Such publication shall be made at least once a week for four successive weeks. When the affidavit gives the post office address of the defendant, the clerk shall mail a copy of the summons, duly stamped, to the defendant, at such address forthwith. The service shall be complete at the expiration of ten days from the date of the last publication."

Attachment of Real Property.

FIRST. "Real property standing on the records of the county in the name of the defendant, shall be attached by filing a copy of the writ together with a description of the property attached, with the recorder of the county."

Paragraph First of Sec. 104, Mills' Ann. Code.

"The writ shall be directed to the sheriff of any county in which the property of such defendant may be *and require him to serve a copy of the writ on the defendant* and to attach and safely keep all of the property of such defendant within his county * * * ."

Sec. 97, Mills' Ann. Code.

Section 96 of the Code in so far as it relates to the matter of service of process, reads as follows:

"The defendant *after the service of the writ of attachment upon him or after he has due notice thereof as hereinafter provided*, his agent or attorney, at any time within the time prescribed for answering may, by affidavit, traverse and put in issue the matters alleged in the affidavit upon which the attachment is based; * * *

"If the defendant fail to traverse the plaintiff's affidavit, the attachment shall be deemed sustained; but it shall not be necessary to have an actual return of the writ before resorting to service by publication or to personal service out of the State, provided the other requisites of constructive service are complied with; the defendant shall also be deemed to have due notice of the attachment when he enters a general appearance, or shall be personally or constructively served, as provided by this act."

Sec. 96, Mills' Ann. Code.

Prorating Statute.

Sec. 92a. "That no final judgment shall be rendered in a cause wherein an attachment writ has been issued and a levy made thereunder, until the expiration of thirty days after such levy has been made, and any reditor of the defendant making and filing an affidavit nd undertaking, as hereinbefore required of the plain-

tiff, together with his complaint setting forth his claim or demand constituting his cause of action against the defendant, shall, *upon application to the court wherein such action is brought*, be made a party plaintiff in such action, and *may have like remedies* against the defendant to secure his claim or demand, as the law gives to the original plaintiff."

Sec. 92c. "The final judgment in said action shall be a *several* judgment, wherein each creditor named as plaintiff shall have and recover of the defendant the amount of his claim or demand, as found to be due, together with his costs; and the money realized from the attachment and garnishee proceedings shall, under the direction of the court, after paying all the costs taxed and included in the said *several* judgments, be paid to the several judgment-creditors in proportion to the amount of their several claims as adjusted and included in such several judgments; and the surplus of any such moneys, if any, shall be paid to the defendant by order of the court."

Actions to Remove Cloud from Title.

An action may be brought by any person in possession, by himself or his tenant, of real property, against any person who claims an estate therein adverse to him, for the purpose of determining such adverse claim, estate or interest."

Mills' Ann. Code, Sec. 255.

Suits to Remove Cloud from Title where Service is Constructive.

"In all actions pending in any court of record of this State, or which may hereafter be brought in any such court, wherein any defendant is not found within the jurisdiction of the court, and constructive service alone is had, and which is brought * * * for the removal of cloud from title to real estate * * * or in any other proceeding *in rem*, or affecting only specific property, where according to the usual practice in courts of chancery, the court, if the defendant had been personally served, might direct or decree any act to be done or performed by the defendant in favor of the plaintiff, the court may appoint a trustee for such defendant to

do and perform in the place and stead of and for each defendant the act required by the decree rendered in any such cause. Any act lawfully done by such trustee, under and in pursuance of any such decree shall be as binding and effectual for all purposes as if done and performed by the defendant in pursuance of such decree."

Sec. 2535, Mills' Ann. Code.

Jurisdiction of the Court of Appeals of Colorado.

Sec. 406d. "The Court of Appeals shall have jurisdiction

FIRST. To review the final judgments of inferior courts of record in all civil cases and in all criminal cases not capital.

SECOND. It shall have final jurisdiction, subject to the limitations stated in subdivision three of this section, where the judgment, or in replevin the value found is two thousand five hundred dollars or less, exclusive of costs.

Third. It shall have jurisdiction not final in cases where the controversy involves a franchise or freehold, or where the construction of a provision of the Constitution of the State or of the United States is necessary to the decision of the case; also, in criminal cases, or upon writs of error to the judgments of county courts. Writs of error from or appeals to the Court of Appeals shall lie to review final judgments within the same time and in the same manner as is now or may hereafter be provided by law for such review by the Supreme Court."

Sec. 406d Mills' Ann. Code.
(L. '91, pages 119–120, Sec. 4.)

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 134.

COSMOPOLITAN MINING COMPANY,
Plaintiff in Error,
vs.
THOMAS F. WALSH,
Defendant in Error.

Inasmuch as defendant in error has made an objection to the allowance of the writ of error in this case, we have deemed it necessary to file a reply, and we shall endeavor to answer, as briefly as possible, only those arguments advanced in his brief that have not been anticipated and fully discussed in our original brief. We shall attempt to answer these arguments as nearly as possible in the order in which they have been made by defendant in error.

PRELIMINARY OBJECTION.

Defendant in error contends that the writ of error should be dismissed under rule 35 because the writ of error and citation were dated August 15th, 1902, while the assignment of errors was not filed until August 18th, 1902. Rule 11 of the Circuit Court of Appeals, and the decisions of that Court with respect thereto, are cited in support of this contention. The purpose of the rule is well stated by Judge Sanborn in France *vs.* Portland Gold M. Co., 108 Fed., 750, and which is quoted on page 7 of the brief of defendant in error. The

purpose is to give the Judge to whom the application is made knowledge of the alleged errors upon which the petitioner relies, so that it may be intelligently decided whether or not the prayer of the petition should be granted. In the case at bar the petition for the writ and the Judge's certificate that a constitutional question was involved, were filed on August 18th, 1902 (Folios 39 and 40), the same date as that upon which the assignment of errors was filed (Folio 48). Both the petition and certificate recite that the assignment of errors is annexed thereto, and the certificate is dated August 15th, 1902 (Folio 40), showing that the assignment of errors was submitted to the Judge with the petition, and that he had the opportunity to examine the same on August 15th, the date of the writ (Folio 196). The writ of error was also filed on August 18th, 1902. In any event the papers took effect when they were filed, and they were all filed on the same day, to wit, August 18th, 1902. The spirit, as well as the letter, of the rule *has been* complied with.

SERVICE IN THE COUNTY.

We do not contend that any of the actions in the controversy were brought in the wrong county, but we do contend that, having been brought in Ouray County, it was necessary to the jurisdiction of the Court that plaintiff in error should be served with process in the manner provided by the statutes of Colorado. If the Court was to render judgment in personam, then service must be made in accordance with Section 38, Subdiv. 9, of the Code. If the judgment was to be in rem, then property must be attached and service must be made by publication, as required by Section 41 of the Code. The service disclosed complied with neither statute, and, therefore, no valid judgment was rendered in personam or in rem.

The statutes giving corporations, both domestic and foreign, the same *rights*, and imposing the same *liabilities* as those enjoyed and borne by natural persons, have nothing to

do with the matter of *service of process.* Corporations cannot be served in the same manner as natural persons, but necessarily must be reached through officers or agents, and the method of making such service is invariably prescribed by statutes expressly passed for that purpose.

In reference to the case of Venner *vs.* Denver Union W. Co., 15 Colo. App., 495, counsel express the opinion that if the return on the original summons disclosed that neither an agent or stockholder could be found in the county the court would have held that if the second writ showed service on a duly authorized agent in another county, that the court obtained jurisdiction. We do not coincide in this opinion, and we desire to call attention to the fact that in none of the cases brought in the County Court was a summons ever placed in the hands of the sheriff of Ouray County nor does it appear that any attempt was made to serve a summons in that county. It is in the return of the sheriff of Ouray County on the *writ of attachment* in the Begole case alone, that we find the statement that he could find no one in his county upon whom process might be served.

TWO METHODS OF SERVICE.

Counsel for defendant in error claim that Section 499 Mills' Ann. Stats. prescribes a *method of service* upon foreign corporations differing from that prescribed by Section 38, Subd. 9th, of the Code, and co-existing with it. We submit that an examination of Section 499 will show that it simply provides for the *appointment* of an agent residing at the principal place of business of the corporation upon whom process may be served. The words "upon whom process may be served" obviously refer to the character of the agency. They certainly do not prescribe any method of service upon such agent. They mean that such agent may be served, but how served? obviously in the manner that may be prescribed by law.

If defendant in error's contention is correct, service may

be made under this statute without reference to time, place, manner of service or character of the action since there are no limitations contained in the act. The appointment of the agent is prescribed as a condition upon which the foreign corporation is permitted to do business in the State, yet it is contended that the authority of such an agent is not dependent upon the doing of such business. The act provides that the agent shall reside at the principal place of business, but as it does not say that he shall be served there, it is claimed that he can be served anywhere, no matter where he resides. No method is prescribed for the resignation of the agent or the revocation of his authority, so his authority must last during life or during his residence in the State and would revive upon his return, either permanently or temporarily, and any statement he may make that his agency has ceased is without avail. He can be served by any person, whether an officer, an infant, or even the adverse party to the action since the act is silent in this respect. In like manner the process need not be read or handed to him or left at his residence but might be sent through the mails. The corporation may have left the State yet any person may serve this agent and obtain a valid judgment regardless of whether or not he is a citizen of the State or the cause of action arose therein. These conclusions are absurd, yet they are irresistible if the contention that this act provides a *method of service* which is independent of the other statutes of the State is upheld. It cannot be the law that because an act prescribes that a certain person may be served and is silent about the time, place, manner and circumstances under which he may be served that service may be made upon him at any time, at any place, in any manner and under all circumstances, especially when there is an act which does prescribe the method of service as Section 38, Subd. 9, of the Code does in this case.

In the case of the Henrietta M. and M. Co. *vs.* Johnson, 173 U. S., 221, the corporation was doing business in Arizona, but had appointed no process agent. The statute of

Arizona provided that service on corporations *generally* might be made by serving certain officers or agents, and service was made on such an agent. It was contended that where there was a statute requiring the designation of a process agent, and prescribing the manner of service upon him, that such statute was exclusive, and if no such agent had been designated there could be no service upon the corporation. This Court held that the statute was not exclusive, and that the general law was broad enough to permit service upon the other officers and agents mentioned therein. We make no such contention in the case at bar. We do not claim that only a designated agent could be served, but we do claim that a designated agent as well as other proper agents or stockholders must be served in the manner and under the conditions prescribed in the only statute relating to service upon foreign corporations, viz., Section 38, Subdiv. 9, of the Code.

JARDINE HAD CEASED TO BE PROCESS AGENT AT THE TIME OF SERVICE.

He had removed from the county designated as the principal place of business, where both the Constitution of the State (Article XV., Section 10, quoted by counsel, on page 18, of their brief), and Section 499, Mills' Ann. Stat., required him to reside. The framers of the Constitution and the Legislature must have had some reason for restricting the appointment to persons residing at the principal place of business. It is evident that it was their intention to provide agents of this character should live at the place where the corporation may be said to reside. If this was the intention it would be defeated by the agent's removal. Counsel's argument that such a construction would destroy the efficiency of the act, because the corporation might not designate another agent, is met by the fact that Section 501 Mills' Annotated Statutes provides a penalty for default in com-

pliance therewith, and this penalty has been held by this Court to be exclusive in the case of Fritts *vs.* Palmer, 132 U. S., 282 (cited by counsel), the Court saying on page 289:

"So far as we are aware, the only penalty imposed by the statutes of Colorado upon a foreign corporation carrying on business in the State before acquiring the right to do so, is found in Section 262 of the same chapter (Gen. Stats. of Colo., Ch. 19), which provides: 'A failure to comply with the provisions in Sections 23 and 24 (Secs. 260 and 261) of this act shall render each and every officer, agent and stockholder in any such corporation, so failing therein, jointly and severaly, personally liable on any and all contracts of such Company made within this State during the time that such corporation is so in default.'

"The fair implication is that, in the judgment of the Legislature of Colorado, this penalty was ample to effect the object of the statutes prescribing the terms upon which foreign corporations might do business in that State.

"It is not for the Judiciary, at the instance or for the benefit of private parties, claiming, under deeds executed by the persons who had previously conveyed to the corporation, according to the terms prescribed for passing title to real estate, to include the additional and harsh penalty of forfeiting for the benefit of such persons the estate thus conveyed to the corporation and by it conveyed to others. * * * If the Legislature had intended to declare that no title should pass under conveyance to a foreign corporation before it acquires the right to engage in business in the State * * * that intention would have been clearly emphasized."

Section 260, above referred to, is Section 499 and Section 262 is Section 501 of Mills' Ann. Statutes.

The authorities cited by counsel hardly support his contention on this point.

Gibson *vs.* Ins. Co., 144 Mass., 81. In this case the corporation was still doing business in the territory, and it does not appear that notice of the termination of the agency was given before judgment, and it was held that service upon a designated agent, under these circumstances, was good, although, as between the Company and the agent, the agency

had ceased. There was no question raised of the disqualification of the agent under the statute.

Eureka Co. *vs.* Superior Court, 66 Cal., 311. The corporation was still doing business in California and the designated agent's authority had not been revoked, either in fact or on the record, and no contention was made that he was not such agent at the time of service. The case turned on the question of whether the statute of 1872, providing for service on designated agents, had been repealed by the Code by which other agents might be served, and it was held not repealed.

DOING BUSINESS.

It is contended that the ownership of property is the doing of business in the State, because the plaintiff in error was by its articles of incorporation authorized to own property. The case of Pennoyer *vs.* Neff has definitely settled the law to be that the existence of property in the State does not imply the presence of its owner there so that a judgment in personam may be rendered against him and be satisfied out of the property. It is true that the owner in that case was a natural person, but we can see no reason why the rule should be otherwise in respect to corporations. The mere ownership of unused property is not the doing of business either as commonly understood or in the sense of the words used in the statute. In St. Clair *vs.* Cox, The Winthrop Mining Company had owned property in the State which had been attached and sold by virtue of the very judgment which was held to be void in personam.

Mr. Justice Jackson in the case of U. S. *vs.* American Bell Telephone Co., 29 Fed. at pages 35, 36 (cited in original brief), says:

"It cannot be held sufficient to give this court jurisdiction in personam over a foreign corporation that it has property rights, however extensive, within the district, or that it has pecuniary interests, however valuable, in business managed and conducted by others. It must itself be carrying on

business in its own right, on its own responsibility, and for its own account, and through or by means of its own agents, officers or representatives, in order to bring it within the operation of the laws of a State other than that in which it is incorporated, making it amenable to suit there as a condition of its doing business in such State."

The case of Sullivan *vs.* Sullivan Timber Co., 103 Ala., 375 (cited by counsel) also holds that the mere ownership of property does not constitute the doing of business, the court saying:

"The real test is applied in Beard *vs.* W. & A. Publishing Co., *supra:* is the corporation engaged in the transaction of business, or any part thereof, it was created and organized to transact. If it be, it 'does business' within the meaning of the constitution. If it be not—if the act it is doing, or has done, is not within its general powers and franchises—it is not the business to which the constitutional requirement is directed.

"When the suit was commenced, the company had an agent or employe in the possession and care of the line of railroad it had constructed in the County of Conecuh, and of the machine it had used in the loading of cars with timber. The railroad and the machine were mere adjuncts or appurtenances to the saw mill it had operated in the County of Escambia. The operation of the mill had been suspended and the railroad and machine were unemployed. The care and protection of unused property, or the payment of taxes which are a charge upon the property, and the payment of which is essential to the preservation of the title to the owner, cannot be deemed the exercise of corporate powers or franchises, nor the transaction of the business, or any part thereof, for which the company was created and organized. These acts did not confer upon the courts of the county jurisdiction to entertain a personal action against the company."

Of course the property owned in the State can be reached by proceedings in rem and the corporation can be sued for this purpose if the statutes of the State so provide and in the manner provided by the statute and that is all that is meant by the authorities cited by counsel that say that a foreign

corporation can be sued if it has property in the State. Our contention here is simply that in order to obtain jurisdiction in rem the statute conferring such jurisdiction must be followed. If counsel's contention is correct it would be possible for any person, even a citizen of the State of Maine, to sue the corporation in Colorado long after it had ceased to transact business there, serve the person who had been its designated agent, obtain judgment and, disregarding the property in Colorado, enforce the judgment wheresoever he saw fit, for it would be in personam. We think it not unreasonable to say that if the legislature of Colorado had power to do this it should not be presumed to have done it unless its enactment was clear, express and unmistakable. There is no necessity for adopting such a construction because the property may always be reached in rem. It is to be observed that all of the authorities relied upon by defendant in error upon this point relate to the acquisition of property in the State, it being held that the act of acquiring property was the doing of business. This is a very different matter from the mere passive ownership of property. In none of the cases did the question of service arise.

PRESUMPTIONS.

It is contended that if it appears from the record that the foreign corporation has designated a principal place of business and a process agent in the State it will be presumed that it did business and was doing business there when service was made, and that in a case of this kind the doctrine announced in St. Clair *vs.* Cox does not apply. The actual doing of business, or actual presence of the corporation in the State *at the time of service* is the fact that confers jurisdiction, and jurisdictional facts that must appear affirmatively are not aided by presumptions. So said Mr. Justice Jackson in the case of the United States *vs.* The American Bell Telephone Company, 29 Fed., 17, 33. If it could be presumed that because a person or corporation was present

at a certain place ten years ago that he or it must be there now, such a presumption would certainly not be entertained in a case where it was necessary to show his presence there now, and the only showing made was that he had been there ten years ago. Such an allegation, under such circumstances, would, on the contrary, indicate that it could not be shown that he was present there now. If plaintiff in error was doing business in Colorado at the time these suits were brought why was it not so alleged, instead of alleging that it had intended to do business there and had appointed an agent and designated a place of business some ten years before ?

JUDGMENTS IN ATTACHMENT CASES CONSIDERED IN REM.

Counsel evidently do not understand our position with reference to the attachment cases considered as judgments in rem, as much of their long argument might otherwise have been spared. We admit that a Court can obtain jurisdiction over property in the State and render a valid judgment against it without a personal service upon its absent owner, but we deny that it can render a valid judgment against the property without notice, either personal or constructive, upon the owner, and we maintain that such notice must be given in accordance with the statute which provides for it. If the notice is by publication or by service outside the State, then it must be given as the statute directs. If it be personal within the State (conceding for the sake of the argument that the action is in rem), then it must conform to the provisions and be given under the conditions prescribed by the statute which provides for that kind of notice. We take the position that no notice was given in these cases in accordance with any statute of the State. No notice was given by publication, and the personal service on J. M. Jardine was void, because plaintiff in error was not shown to be doing business in the State, and because it was served out-

side the county of the action, and service upon him, under these circumstances and in this manner, was not permitted by the statute. There was, therefore, no notice such as the law requires.

Judgments in rem can be attached collaterally for lack of jurisdiction, too, as well as judgments in personam and due notice is one of the elements of that jurisdiction.

It may be conceded that where the record is silent as to notice the jurisdiction of the Court to render judgment against the *res* will be presumed in the case of collateral attack, but there can be no such presumption when the record discloses a void notice. This, in brief, is our position on this point and believe it to be sustained by the authorities cited in our original brief.

Cooper *vs.* Reynolds, 10 Wall., 108, does not hold that the service of a copy of the writ of attachment dispenses with the necessity of serving a summons, except in cases where the statute so specifically provides and the writ of attachment contains or is accompanied with a notice equivalent to a writ of summons. In that case this court had under consideration a judgment rendered in the State of Tennessee. The code of that State provided for publication of a notice in attachment, it provided further that this notice should contain the names of the parties, the style of the court, the alleged cause of attachment and the time and place where the defendant was required to appear and defend the attachment and it provided finally that the publication of this notice should be in lieu of personal service and that upon the return of the attachment duly levied the plaintiff might proceed as if suit had been commenced by summons.

It was conceded by the counsel in that case and understood by this court that in Tennessee the publication of this notice was in attachment suits to serve the purpose of original process to bring the defendant into court and to dispose with the necessity of publishing the summons.

It was not contended that there was no notice published,

but it was contended that the proof of publication did not comply with the requirements of the statute of the State. The notice actually published was missing from the files, but the records of the State court showed the order of publication and publication as made in the Knoxville Whig and the record recited that publication had been made according to law.

FOURTEENTH AMENDMENT.

It is not contended that statutes of Colorado provide a system of procedure that violates the Fourteenth Amendment in regard to "due process of law." The question presented here is that the courts have not complied with the laws of the State which guarantees due process of law, and have taken the property of plaintiff in error without obtaining jurisdiction over it, and have condemned and sold that property without lawful notice to plaintiff in error.

While this Court has refused to give any general definition of "due process of law," it has held in the case of Walker *vs.* Sauvinet, 92 U.S.,90, 93, that "due process of law," as used in the Fourteenth Amendment, means process of law as fixed by the State, provided, of course, that the law of the State does not conflict with the Federal Constitution. To the same effect we cite Hurtado *vs.* California, 110 U. S., 5-16, 535.

In Pennoyer *vs.* Neff this Court has said on page 733 that since the adoption of the Fourteenth Amendment the proceedings of a Court of Justice without jurisdiction over the person of the defendant in an action in personam can be questioned on the ground that they do not constitute due process of law.

It would be absurd to say that if the laws of a State do not violate the Fourteenth Amendment that the proceedings of its courts cannot be questioned on this ground, even though they show another disregard of the laws of the State and the principles which underlie them.

DEFENDANT IN ERROR AS AN INNOCENT PURCHASER.

We are not disposed to quarrel with the authorities cited by counsel under this head of their argument. It is no doubt true that an innocent purchaser at a judicial sale will be protected if the judgment is simply erroneous and has not been reversed, but if the judgment be void for lack of jurisdiction, it is a nullity and no one can acquire any rights under it.

The Supreme Court of Colorado in the case of Great West Mining Co. *vs.* Woodmas of A. Co., 12 Colo., 46, says on page 53:

"It was competent to show that the service of the writ and summons was not made upon a general agent of the defendant and that the entry of appearance by the attorney was unauthorized, and that no notice was given to the parties whose right was sought to be affected by such entry. It follows as a logical result of the propositions before discussed that a judgment rendered without service, or upon the unauthorized appearance of an attorney, is (whenever it is made to appear by proper proceedings instituted for this purpose) void, and that all sales or other proceedings had thereunder are, as to all persons, irrespective of notice or bona fides, absolute nullities."

If our argument has served any useful purpose it has shown that the judgments under which the property was sold were absolutely void for lack of jurisdiction, and that the sale was void for the same reason.

ATTACK ON SHERIFF'S SALE.

The sheriff's sale is a necessary link in the title of defendant in error. If it is void then the judgments, even if valid, would simply stand as judgments that had never been enforced. If defendant in error claims title through the judg-

ments, it is essential for him to show a valid sale under them.

The alleged prorating order, as we have said, is undated and unsigned, and, as it does not appear to have ever been entered or filed in the case, it is impossible to tell when it was placed among the papers in the Begole case. It was evidently drawn before the sale, as it orders the sheriff to make sale, but if it had been actually made by the Court it would have been made without jurisdiction, because Fulton was not a party to the suit, nor had he ever applied to be made a party. He had not invoked the jurisdiction of the Court in that case, and his claim was not a part of the subject matter involved therein. The sale was not merely erroneous. It must have been absolutely void, because the return of the officer shows, beyond question, that it was made, in part, under the void writ of execution in the Fulton case to satisfy the judgment in that case, which was void on its face for lack of jurisdiction.

Counsel are in error in regard to the facts disclosed by the record in the Fulton case, for they say that it shows a "levy of attachment on the same property in the same manner as in the other cases." (See top of page 111, defendant in error's brief.) An inspection of the record in the Fulton case will disclose no attempt to levy on any property whatever, but simply a service of the writ on J. M. Jardine (see record in Appendix to plaintiff in error's brief, pp. 128-136). Counsel are also in error in stating that the executions were special (see top of page 116 of their brief). The execution in the Fulton case was a general one. (Transcript, Folio 151.)

SUIT TO QUIET TITLE IN PERSONAM OR IN REM.

In addition to what has been said in our original brief in regard to the suit to quiet title as an action in personam, we deem it to be sufficient to say that the authorities quoted by

counsel simply hold that it is competent for a State to provide by statute for constructive service in suits to quiet title, and that in case of such constructive service the judgment is in rem. This doctrine we, of course, concede, but it has no reference to the case under consideration where the service was personal within the State.

FORM OF THE DECREE.

It is undoubtedly true that a State has power by statute to vest in its court jurisdiction to establish a title by the force of the decree itself in suits to quiet title to lands within its borders. The question here is, has the State of Colorado done this? It has enacted Section 255 of Mills' Annotated Code, which the Supreme Court has held to be merely a statutory declaration of the old chancery practice (Wall *vs.* Magnes, 17 Colo., 476). It has enacted Section 2535 Mills' Annotated Statutes, providing that in case of constructive service a trustee may be appointed to perform all acts that the decree required of the defendant. We see nothing in these acts that changes the rule announced in Hart *vs.* Sansom.

REJECTION OF EVIDENCE.

The plaintiff in error offered to prove that it was not doing business in Colorado at the time service was made upon J. M. Jardine as its designated agent. The court excluded the offer unless it should also prove that there was no designated process agent there. The court said: "That record (meaning the suit to quiet title) was admitted on the theory at least that the corporation consented to be served by serving the particular agent. The other records were admitted on the theory that it sufficiently appeared in the complaints that the corporation was doing business in Colorado." (See transcript, bottom of page 98.) Plaintiff in

error had appointed J. M. Jardine its process agent and his authority had not been revoked of record, there being no method of doing this provided by law. The question presented by the ruling of the court therefore is: Does the cessation of business by the corporation revoke the designated agent's authority to receive service of process, under the laws of Colorado? We maintain that his authority is revoked, while defendant in error's whole argument, when reduced to its last analysis, is that it is not revoked.

We admit that the State of Colorado can, by express statute, continue the authority of such an agent beyond the time when the corporation ceases to do business there, at least so far as all matters arising out of the transaction of business done there is concerned, and that this authority could be made to continue in reference to property acquired in the State. The authorities cited by counsel all fall within this undisputed doctrine.

But if the agency is to continue it must be made to do so by express statute. The power of the State over foreign corporations is purely statutory and the corporation has a right to know what liabilities it is assuming by doing business there and what powers it is conferring when it designates a process agent.

This point is so important to the determination of this case that we may be pardoned for indulging in some repetition.

There is certainly nothing in Section 499 of the Statutes that indicates that the authority of the agent is to be continued beyond the time of the doing of business in the State. Nothing is said about property or contracts in the State. It provides merely for the appointment of an agent. If, however, it could be implied or in any manner inferred that the agent's authority was to be continued beyond the doing of business the inference would be destroyed by the subsequent enactment of Section 38, Sub. 9, of the Code, which expressly limits service upon agents of foreign corporations to those corporations which are doing business in the State

and which has been so construed by the Circuit Court of Appeals in Rust *vs.* Water Works.

The authorities cited by us in sustaining our contention that, in the absence of statute otherwise providing, a designated agent's authority ceases with the cessation of business by the corporation are directly in point and have not been distinguished in any way from the case at bar. Forrest *vs.* Bridge Co., by the Circuit Court of Appeals for the Seventh Circuit; People *vs.* Commercial Alliance Insurance Company, by the Supreme Court of New York; Mutual Reserve Fund Life Ass'n *vs.* Boyer, by the Supreme Court of Kansas; De Castro *vs.* Telegraph Co., by Judge Lacombe in the United States Circuit Court in New York; Guthrie *vs.* Indemnity Association by the Supreme Court of Tennessee, and Graves *vs.* Posner, by the Supreme Court of Iowa, were all decided with special reference to designated process agents (see pages 72-79 our original brief) and they are, so far as we are advised, not opposed by any authority cited by counsel for defendant in error.

Respectfully submitted.

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In the Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 134.

COSMOPOLITAN MINING COMPANY,
PLAINTIFF IN ERROR,

vs.

THOMAS F. WALSH, DEFENDANT IN ERROR.

In Error to the Circuit Court of the United States for the District of Colorado.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR RELATING TO THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

This case has been brought to this court, upon error, directly from the Circuit Court of the United States for the district of Colorado, under the act of Congress of March 3, 1891, 26 Stat., 826, chapter 517, and under that clause of section 5 of that act, which provides that an appeal or writ of error may be prosecuted from the Circuit Courts to this court "in any case that involves the construction or application of the Constitution of the United States."

The provision of the Constitution of the United States that is claimed to be involved in this case is that clause of the Fourteenth Amendment which reads as follows:

> "nor shall any state deprive any person of life, liberty or property without due process of law."

This clause of the Fourteenth Amendment is claimed to be involved in the following respects, viz.:

1. That the judgments rendered by the County Court of Ouray county, in the actions brought by The A. W. Begole Mercantile Company, John Ashenfelter and P. H. Fennell, respectively, were void for lack of jurisdiction over the defendant, this plaintiff in error, (a) because they were in personam, and failed to show affirmatively that plaintiff in error was doing business in the state at the time of service, which was, under the doctrine of St. Clair vs. Cox, 106 U. S., 350, necessary to support jurisdiction, and because the allegation that plaintiff in error was a foreign corporation, "with its principal office in Ouray," has been met by uncontradicted evidence that it had no office there; (b) because service upon J. M. Jardine, as the agent of plaintiff in error, even admitting him to have been a designated process agent, was, under the laws of Colorado, no notice to plaintiff in er-

ror, unless it was, at the time, doing business in the state, and conferred no jurisdiction upon the court, Jardine's authority as agent being dependent upon the doing of business in the state; (c) because the records in these cases show that service of process was made outside the county of the action, and such service, in Colorado, confers no jurisdiction on the court.

2. That if these judgments be considered in rem, the court had no jurisdiction to render them, because there was no notice by publication and no service at all, such as is required by the laws of Colorado, and under the decisions of the highest court of that state (Great West Mining Co. vs. Woodmas of Alston Mining Co., 12 Colo., 46, and Thomson vs. White, 25 Colo., 226, such service is necessary to confer upon the court jurisdiction to pronounce judgment and to condemn and sell the property.

3. That the sale of the property of plaintiff in error under the execution issued by the County Court of Ouray county, upon the judgment rendered in the action brought by William C. Fulton, was void, and deprived plaintiff in error of its property without due process of law, (a) because the judgment was rendered without jurisdiction, and (b) because it does not even appear that the judgment was

rendered against plaintiff in error, but simply that it was rendered against "Cosmopolitan Mining Company, a corporation organized under the laws of ———."

4. That the decree entered by the District Court of Ouray county in the suit to quiet title was void for lack of jurisdiction over the defendant, this plaintiff in error, (a) because the action was in personam, and the necessary jurisdictional averment, that plaintiff in error was doing business in the state, did not appear, and because, if it had appeared, it would be of no avail, for the reason that plaintiff in error offered, but was not allowed, to prove that it was not doing business there, and (b) because service upon J. M. Jardine, as the designated process agent of plaintiff in error, was, under the laws of Colorado, no service, unless the plaintiff in error was doing business in the state, Jardine's authority being dependent upon that fact.

5. That if the decree to quiet title be considered in rem, then the court obtained no jurisdiction, because there was no service by publication, nor any service such as is required by the laws of Colorado, since, under section 38 of the Code, service may not be made upon an agent of a foreign corporation unless it be doing business in the state, and, under the authority of the Colorado cases cited in paragraph 2

above, the court obtains no jurisdiction to render a judgment in rem until due service is had.

6. That the decree to quiet title was void for the further reason that the court had, under the authority of Hart vs. Sansom and the statutes of Colorado and authorities cited in our original brief, no jurisdiction to enter a decree establishing a title. Such a decree was not within the issues of that action, and could not be rendered pursuant to the subject-matter over which the court had jurisdiction, and a decree, rendered without jurisdiction of a subject-matter which authorizes the decree, which deprives a person of his property, must fall within the prohibition of the Fourteenth Amendment in reference to due process of law.

The statement of the particulars, in which it is claimed that the constitutional question is involved, has, necessarily, required some repetition of the argument made in the original brief, for, in our view, practically every point made in the case against the jurisdiction of the courts which rendered the judgments and decree presents also the question of due process of law under the Fourteenth Amendment.

We propose to discuss the question of the application and construction of this clause of the amendment, with reference to the case at bar, in the following order, viz.:

First. The proceedings of the County and District Courts of Ouray county were the acts of the state of Colorado, in the sense that the word "state" is used in the amendment.

Second. The County and District Courts of Ouray county had no jurisdiction to render the judgments and decree complained of, under the laws of Colorado, the state which created the courts, and therefore the proceedings violate the amendment.

Third. These courts had no jurisdiction, upon the general principles of the law, and their proceedings were, therefore, within the prohibition of the amendment.

First. The first question that naturally presents itself in discussing the application of this clause of the Fourteenth Amendment to an actual case is, whether the act alleged to be within the prohibition is the act of a *state*. If not, then the case is manifestly not one involving the constitutional question. There would seem to be no difficulty, in this respect, in the case at bar. All of the proceedings that are complained of as not constituting due process of law were had in the courts of Colorado, which were acting in the name of the state and were carried into effect by the power of the state. The proceedings were the acts of the state of Colorado, and within the prohibition of the Fourteenth Amendment, to the same extent that the arbitary seizure of the property by the executive, or an act of confiscation by the legislature, would have been.

In the case of Scott vs. McNeal, 154 U. S., 34, this court, in holding that a sale of real estate, through an administrator, by a probate court, in the state of Washington, void for lack of jurisdiction, and therefore not constituting due process of law, the owner of the property being alive, says, on page 45:

> "The Fourteenth Amendment of the Constitution of the United States, after other provisions which do not touch this case, ordains 'nor shall any state deprive any person of life, liberty or property without due process of law, * * *.' These prohibitions extend to all acts of the state, whether through its legislative, its executive or its *judicial* authorities. Virginia vs. Rives, 100 U. S., 313, 318, 319; Ex parte Virginia, 100 U. S., 339, 346; Neal vs. Delaware, 103 U. S., 370, 397."

See, also:

> Yick Wo vs. Hopkins, 118 U. S., 356, 373.
>
> C., B. & Q. R. R. vs. Chicago, 116 U. S., 233, 234, 235.

If, then, the state may violate the amendment through any one of its great branches of government, it is pertinent to define which branch is claimed to have violated it in the case at bar and in what manner.

There is no act of the executive department that is complained of.

It is not contended that the legislature has enacted any law that might deprive a person of his

property without a reasonable opportunity to be heard.

The contention here is that the County and District Courts of Ouray county have deprived plaintiff in error of its property by judgments and proceedings had without jurisdiction and, therefore, without due process of law.

Second. This court has repeatedly refused to define the phrase "due process of law." It has, however, held that it was not the purpose of the Fourteenth Amendment to establish any uniform method of procedure throughout the states, nor to provide any particular method of procedure in any state. Speaking generally, it is the province of each state to prescribe for its courts the manner and method of administering justice therein, and, so long as that manner and method provide for reasonable notice, an opportunity to be heard concerning the matter to be tried, and relate to persons and things within the jurisdiction of the state, they do not violate the amendment, and judicial proceedings had in conformity therewith are not within the prohibition of the amendment. But if the courts of a state proceed in violation of the laws which that state, itself, has enacted, as the method of obtaining jurisdiction by the courts, and the effect of those proceedings is to deprive any person of his property, we contend that such proceedings do not constitute "due process of law" within the meaning of the amendment.

In the great case of Pennoyer vs. Neff, 95 U. S., 714, Mr. Justice Field says, on page 733:

> "Since the adoption of the Fourteenth Amendment to the federal Constitution, the

validity of such judgments may be directly questioned, and their enforcement in the state resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties *over whom that court has no jurisdiction* do not constitute due process of law. Whatever difficulty may be experienced in giving to these terms a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt of their meaning when applied to judicial proceedings. *They then mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights.* To give such proceedings any validity, there must be a tribunal, competent by its constitution—that is, *by the law of its creation*—to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the state, or by his voluntary appearance."

And again, in the case of Scott vs. McNeal, 154 U. S., 34, supra, this court has said, on page 46:

"No judgment of a court is due process of law if rendered without jurisdiction in the court, or without notice to the party."

What is meant by the expression "service of process" or "notice to the party?" Do they mean that process may be served or notice be given in any manner that may suit the whim, caprice or convenience of the officer who holds the writ, or do they mean, as Mr. Justice Field says in the above quotation, "a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence?" If it is necessary, in order to constitute due process of law, that the court should, by the law of its creation, have jurisdiction of the subject-matter, why is it not equally necessary that the court should, "*by the law of its creation*," obtain jurisdiction over the defendant? In either case the court acts in the name of the state, but its acts are not legal proceedings in any sense, because the state has not authorized it to act at all under such circumstances. Any case where a person has been deprived of his property by the proceedings of a court acting without jurisdiction, owing to a failure to observe the laws of the state creating the court, is, we contend, within the prohibition of the amendment.

In the case of Walker vs. Sauvinet, 92 U. S., 90, the question presented was whether or not the trial of cases at common law without a jury constituted due process of law, the statute of the state providing that, under certain circumstances, this might be done. This court held that such a trial was due process of law under the Fourteenth Amendment, saying, on page 93:

> "This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings. Mur-

ray's Lessee vs. Hoboken L. & S. Co., 18 How., 280. Due process of law is process due according to the law of the land. This process in the states is regulated *by the law of the state.* * * * Here the state court has decided that the proceeding below *was in accordance with the law of the state;* and we do not find that to be contrary to the Constitution or any law or treaty of the United States."

To the same effect is

Hurtado vs. California, 110 U. S., 516, 535.
Missouri vs. Lewis, 101 U. S., 22, 30.

Applying this principle to the County Court cases, it will, we submit, be seen that our contention that the court did not obtain jurisdiction over the plaintiff in error, because service of process on an agent, when the foreign corporation is not doing business in the state, and service of process outside the county of the action, are not permitted by the laws of Colorado, presents the question of due process of law under the amendment.

In like manner, our contention that the County Court did not, under the statutes and decisions of the Supreme Court of Colorado, have jurisdiction to render a judgment in rem, because there was no service of process, either constructive or personal, in conformity with the laws of Colorado, presents the constitutional question of due process of law. The Supreme Court of Colorado has said, in the case of Great West Mining Co. vs. Woodmas of Alston Mining Co., 12 Colo., 46, on page 55:

> "The courts have uniformly held that this requirement demands that there shall be notice and hearing before condemnation. Any proceeding which violates these principles is not '*due process of law*,' and is not according 'to the law of the land.' Where the property of a citizen is taken and condemned without notice to him, it is entirely immaterial whether it be by a *special* or a *general* judgment, * * *."

Applying the principle to the decree to quiet title, our contention that the District Court of Ouray county obtained no jurisdiction over plaintiff in error, because the laws of Colorado do not permit service upon an agent of a foreign corpration unless it be doing business in the state, involves the application and construction of the due process of law clause.

We contend, further, that under the laws and decisions of the Supreme Court of Colorado and the decision of this court in Hart vs. Sansom, 110 U. S., 151, the District Court had jurisdiction of no subject-matter, in a suit to quiet title, that would give it power to make a decree establishing a title; that such decree was, therefore, entered without jurisdiction, and, if given effect, will deprive plaintiff in error of its property without due process of law.

Under the law of Colorado, if our position is well taken, the issues presented by a suit to remove cloud from title gave no notice that a decree establishing a title would be entered or an opportunity to be heard on any matter that would authorize such a decree.

In the case of Castle vs. Persons, 117 Fed., 835, the question was presented of the right of a court to

disregard the issues made by the pleadings and render judgment on proof of facts not involved in the issues, and Mr. Justice Sanborn said, on page 843:

> "That due process of law, without which parties may not be deprived of their property, gives to them an opportunity to be heard respecting the justice of the judgment sought. It gives notice of the issue to be determined before it is tried. One may not bring suit on one cause of action and recover upon another, * * *."

Third. We have endeavored to show that, tested by the laws of Colorado, the state which created the County and District Courts of Ouray county, the proceedings relied upon by the defendant in error were had without jurisdiction, and therefore were not due process of law, but we also insist that upon the general principles of law these proceedings were in violation of that clause of the Fourteenth Amendment which requires due process of law.

It is unnecessary to cite authorities to this court upon the proposition that if a state court assumes jurisdiction over a person not within the state, and such person does not voluntarily submit to this jurisdiction, the proceedings do not constitute due process of law within the meaning of the amendment. Neither do we deem it necessary to cite additional authorities to the effect that a foreign corporation, which is not doing business in the state, is not present therein in any sense that will enable the courts to exercise jurisdiction over it in personam. Practically all of the authorities cited in our original brief sustain this doc-

trine, and the fact that this court has, without question, taken jurisdiction in these numerous cases, would seem to indicate that this constitutional question was involved whenever a state court assumed this jurisdiction. We do not, of course, contend that the foreign corporation could not, by a voluntary appearance, submit to the jurisdiction of the state court, or that it could not, by previous appointment, authorize any person to receive service of process of the state courts, in any action that might be brought against it, without regard to the doing of business by the corporation in the state. But in such a case the action of the corporation is purely voluntary, and we submit that the designation of a process agent in compliance with a state statute, requiring the designation of such an agent, as a prerequisite to the right to do business there, is not a voluntary act, and should not be construed as conferring any greater or other powers upon the agent than those required by the statute, and, unless the statute itself continued the authority of the agent beyond the period during which the corporation does business in the state, the agent's authority should be held to cease when the corporation no longer exercises the privilege. The numerous authorities cited on pages 72 to 78 of our original brief fully sustain this view of the duration of a designated agent's authority, and are, we believe, opposed by no authority whatever. It would seem that, so far as the jurisdiction of this court is concerned, and the nature of the constitutional question presented, the case of Mutual Life Insurance Co. vs. Spratley, 172 U. S., 602, is very similar to the case at bar. In that case the insurance company con-

tended that it was not doing busines in the state of Tennessee at the time of service of process; that the person served had no capacity to represent it; that the court, therefore, obtained no jurisdiction over it, and that the judgment, therefore, if enforced, would deprive it of its property without due process of law, contrary to the Fourteenth Amendment. Here plaintiff in error contends that it was not doing business in the state of Colorado at the time of service of process in the County Court, and met the only allegation contained in the records of those cases that could be construed as alleging that it was doing business there, viz., that it was a foreign corporation, "with its principal office in Ouray," by undisputed proof to the contrary. Here, also, plaintiff in error contends, with reference to the County Court judgments, that J. M. Jardine, the person served as its agent, even assuming that he had been designated as process agent, had no capacity to represent the plaintiff in error after it had ceased to do business in the state, and that for these reasons the County Court of Ouray county had no jurisdiction to render the judgments, and to enforce them would be to deprive plaintiff in error of its property without due process of law, contrary to the Fourteenth Amendment.

Plaintiff in error makes the same contentions with regard to the decree of the District Court of Ouray county. In this case of Mutual Life Ins. Co. vs. Spratley, in discussing the constitutional question presented, Mr. Justice Peckham says, on pages 609-610:

> "The federal question with which we are now concerned is whether the court obtained

> jurisdiction to render judgment in the case against the company, so that to enforce it would not be taking the property without due process of law. Even though we might be unprepared to say that a service of process upon 'any agent' found within the county, as provided in the statute, would be sufficient in the case of a foreign corporation, the question for us to decide is whether, upon the facts of this case, the service of process upon the person named was a sufficient service to give jurisdiction to the court over this corporation. If it were, there was due process of law, * * *."

While this court held, in the Spratley case, that the corporation was doing business in the state, and that the agent was authorized to represent it, yet the constitutional question involved was substantially the same as that presented in the case at bar, and this court took jurisdiction.

Plaintiff in error further contends that the sheriff's sale, made under the four executions issued by the County Court of Ouray county, deprived it of its property without due process of law, in violation of the Fourteenth Amendment, not only on the grounds mentioned above, but also because one of these executions (that in the Fulton case) was issued on a judgment, not only void, but also not appearing to have been rendered against the plaintiff in error. If we were to assume the other three County Court judgments to be valid, and the sale to have been made under execution issued on one of these valid judgments, and the sheriff to have applied the proceeds

of the sale to the satisfaction of a void judgment, or had paid the proceeds to a person not a judgment creditor at all, the *constitutional question would not* be raised thereby, and the sale would undoubtedly be valid, because the matter would become one merely of misapplication of proceeds for which the sheriff would be liable. But that is not this case. Here the writ itself, under which the sheriff acts, as much as he acts under the other writs, is void, and inasmuch as he acts as an officer of the court, and in the name of the state, the effect is, we submit, to deprive plaintiff in error of its property without due process of law within the meaning of the amendment.

No question is raised concerning the jurisdiction of the court below, but it does appear that that jurisdiction was obtained by reason of diversity of citizenship. While section 6 of the act of March 3, 1891, provides, among other things, that the Circuit Court of Appeals shall have final appellate jurisdiction in cases where the jurisdiction of the court below was obtained by reason of diversity of citizenship alone, this court has held that, in such a case, appeal or error lies direct to this court, if the case involves the questions mentioned in section 5 of the act.

Loeb vs. Columbia Township Trustees, 179 U. S., 472, 477, 481.

Huguley Mfg. Co. vs. Galeton Cotton Mills, 184 U. S., 290, 295.

It does not seem that there can be any doubt of the controlling nature of the matters presenting the constitutional question, since they involve all of the

proceedings relied upon by the defendant in error as his sole defense, and embrace practically all of the issues in the case.

The constitutional question was presented in apt time, as it was raised by the pleadings in the amended replication (folios 29-30, Transcript), by objection to the admission of the judgments and decree in evidence (folios 94-95, 153, Transcript), and by plaintiff in error's motion for a directed verdict. The judge of the trial court has certified that it was involved in the trial of the case. (Folio 40.)

The case at bar turns wholly upon the question of the jurisdiction of the County and District Courts of Ouray county, and, under the authorities cited herein, the constitutional question, by reason of which this court takes jurisdiction, is involved.

Respectfully submitted,

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In the Supreme Court of the United States.

October Term, 1906.

No. 184.

COSMOPOLITAN MINING COMPANY,
Plaintiff in Error,

vs.

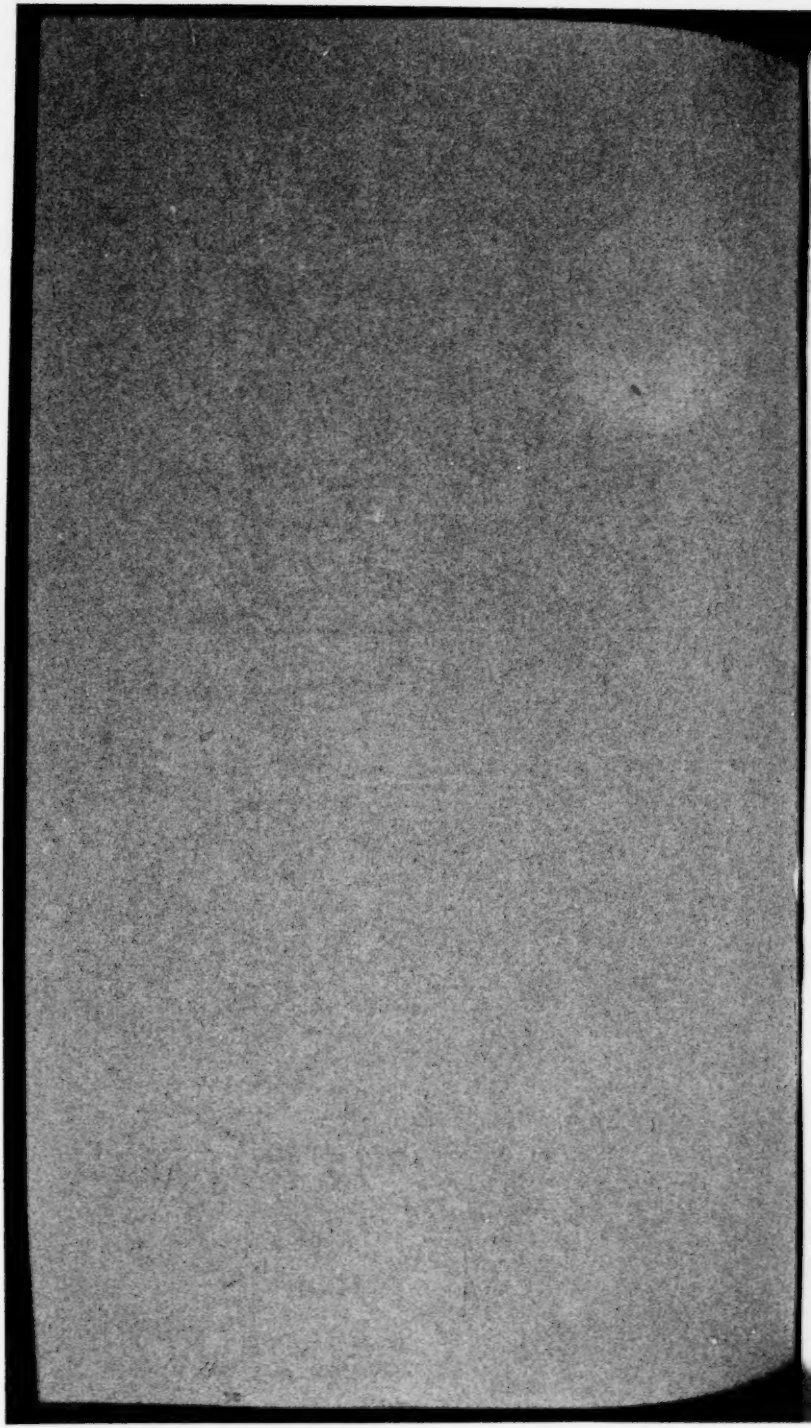
THOMAS F. WALSH, Defendant in Error.

Error to the Circuit Court of the United States for the District of Colorado.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

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12050

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

No. . 134

Error to the Circuit Court of the United States for the District of Colorado.

COSMOPOLITAN MINING COMPANY,
PLAINTIFF IN ERROR,

vs.

THOMAS F. WALSH, DEFENDANT IN ERROR.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

On the 26th day of June, 1884, the plaintiff in error was organized under the laws of the state of Maine, for the purpose of "buying, owning, selling, leasing, working, developing and improving gold, silver, copper and other mines, and purchasing and holding such other property as may be necessary or convenient." On December 16, 1885, in compliance with the requirements of the laws of Colorado, it designated Ouray, Ouray county, Colorado, as the principal place where its business would be carried on in that state,

and J. M. Jardine as its authorized agent, "upon whom process may be served."

On June 8, 1890, it became the owner, by conveyance from one Thomas F. Wentworth, of the Yellow Rose, Norma, Crusader, Talisman, Hidden Treasure, Gertrude and Emily lode mining claims, and the mill sites patented therewith, all situate in the county of Ouray, and state aforesaid.

In the months of April and May, 1895, certain creditors of the Cosmopolitan Company, viz., the A. W. Begole Mercantile Company, John Ashenfelter, P. H. Fennell, W. C. Fulton, and Daniel Golden, began their respective actions in attachment in the County Court of Ouray county against the company. Writs in these cases were placed in the hands of the sheriff, and, excepting that in the Fulton case, were levied on the property above mentioned. These levies were duly recorded, as required by law. The summons were returned *non est inventus* as to Ouray county. Similar process was served, however, by the sheriff of the adjoining county of San Miguel upon Jardine, duly appointed process agent of the company, then in that county.

In due course, judgments by default were entered in these actions against the defendant, and special executions were issued against the property hitherto attached. The Golden judgment was settled, and the sheriff duly advertised and sold the mines and lode claims, under the Begole execution, to J. C. Marsh, trustee, for the sum of $1,616.97, on the 24th day of August, 1895. Marsh sold and assigned his certificate of sale to Stephen A. Osborne on January 4, 1896. On May 26, 1896, the statutory period of redemption having expired, the sheriff executed his

deed for the premises to Osborne, who, by deed of June 16, 1896, for a stated consideration of $10,000, conveyed them to the defendant in error, who entered into, and has since been in, the possession thereof.

On March 1, 1897, Walsh filed his bill in the District Court of Ouray county against the Cosmopolitan Company and Jardine to quiet and confirm his title to all the mines in suit, save the Norma mine and mill site, which were in some manner omitted from the bill. Service was had upon Jardine in Ouray county, as the agent of the company. Jardine disclaimed any interest in the suit; alleged that he had mailed the writs in the original cases, with postage prepaid, to the president of the company, in envelopes with return cards printed thereon; that he had received no reply; that the letters were not returned, and that he had, therefore, permitted judgments to go by default.

The return to the summons in this case recites that service was made "on the Cosmopolitan Company by delivering to John M. Jardine, the duly authorized agent of the defendant company, and designated by it as the person upon whom service should be made, a copy of said summons, with a copy of the complaint attached specially for said defendant company." A default was entered against the company on March 25, 1897, and thereafter a judgment upon evidence was entered, confirming the title of the plaintiff to the mines mentioned in the complaint, and decreeing that "the said defendants have not, nor have either of them, any right, title, interest, claim or demand in or to any part of the premises above described, and that the pretended claim of the defendant, the Cosmopolitan Mining Company, in and to said premises, is wholly without right or justification in law. That the plain-

tiff is the owner and in the possession of the premises and mining claims above described, and entitled to the quiet and peaceable possession of said mining claims, and each of them."

On the 3d day of November, 1900, the plaintiff in error filed its complaint in ejectment against the defendant to recover possession of the mining premises in controversy. The defendant made answer on the 28th day of January following, to which, on February 28th, the plaintiff replied. Nine months subsequently plaintiff's counsel seem to have discovered some relation of the fourteenth amendment to their client's demand, hence they filed an amended replication, alleging that "the plaintiff has been, and is being, deprived of its property, viz., the property sought to be recovered in this action, without notice, hearing, opportunity to be heard or due process of law, and in violation of the fourteenth amendment to the Constitution of the United States."

On June 20, 1902, the cause being on trial, the jury, by the court's direction, returned a verdict for the defendant. Three days afterward judgment was rendered on the verdict. The case is now here, pursuant to the certificate of his Honor Judge Marshall that in the record "were involved the application and construction of the Constitution of the United States, viz., of the part of the fourteenth amendment to the same which provides for due process of law."

ARGUMENT.

The title of the defendant in error to the premises sought to be recovered is founded, first, upon execu-

tion sales thereof under the judgments of the County Court of Ouray county, in the attachment cases instituted therein against the plaintiff in error by its creditors; and, second, upon the decree of the District Court in the Walsh case, whereby his title derived from the sales under these judgments was sought to be confirmed. If title under the judicial sales be proof against collateral attack, independent of the confirmatory decree, the latter becomes unimportant. If, in the original proceedings, any defect sufficiently serious to expose the judgment to collateral attack existed (which we deny), and such defect has been cured by the confirmatory decree, the validity of the latter is an essential subject of inquiry.

We shall contend for the affirmance of the judgment of the court below because:

First. *The County Court of Ouray county had jurisdiction of the defendant and of the property in controversy in the attachment suits. Either element is sufficient to sustain the judgments complained of and the title founded upon them.*

Second. *The District Court of Ouray county had jurisdiction of the defendant company and of the subject-matter of the action. Either element makes its decree conclusive upon the parties to this proceeding.*

Preliminary to these propositions is a question affecting the regularity of the proceedings in suing out the writ and assigning errors which justifies a demand for dismissal.

A PRELIMINARY OBJECTION.

The case comes to this court on writ of error direct from the Circuit Court of the United States, and

is, therefore, governed by Rule 35, requiring the plaintiff in error to file with the clerk of the court below an assignment of errors with his petition for writ of error. It is also by the rule provided that "no writ of error or appeal shall be allowed until such assignment of errors shall have been filed." It appears from the record (Transcript, pages 114-115) that the writ of error and citation were issued and dated August 15, 1902. The assignment of errors was not filed until the 18th of August, 1902, or three days thereafter. (Transcript, page 23.)

Rule 35 of this court is practically identical with Rule 11 of the Circuit Court of Appeals, and which has been enforced sometimes on motion, sometimes by the court of its own motion. In United States vs. Goodrich, 54 Fed. Rep., 21; 4 C. C. A., 160, the appeal was dismissed because the assignment of errors was not filed prior to or at the time of the taking of appeal. A similar decision was made in Union Pacific Ry. Co. vs. Colorado Eastern Co., 4 Fed., 22, since which time its enforcement has been constant, and appeals and writs of error dismissed where the same was not strictly observed.

Railway Co. vs. Reeder, 76 Fed., 550.
Van Gunden vs. Railroad Co., 52 Fed., 838.
Flahrity vs. Railroad Co., 56 Fed., 908.
Lloyd vs. Chapman, 93 Fed., 599.
Insurance Co. vs. Conoley, 63 Fed., 180.

In Frame vs. Portland Gold Min. Co., 108 Fed., 750, a motion was sustained to dismiss the assignment of errors, and was filed two days after the filing of the

writ. Judge Sanborn, in dismissing the writ of error, says:

> "This is a just and reasonable rule. It makes the filing of the assignment of errors before the writ is allowed indispensable to its issue, to the end that the judge to whom application is made for its allowance may be informed what the alleged errors are upon which the petitioner relies, and may thus intelligently decide whether or not the prayer of his petition should be granted, and also to the end that the opposing counsel and the appellate court may be informed what questions of law are raised for consideration."

We invoke the same construction of Rule 11 of the Circuit Court for the reasons therein alleged. Inasmuch as the writ of error is governed by Rule 35 of this court, its requirement should be applied and enforced in like manner as Rule 11 is enforced by the ~~courts of~~ the Circuit Courts of Appeals.

CASE ONE OF COLLATERAL ATTACK.

This case involves the sole question of the right of plaintiff in error to collaterally attack the validity of the judgments in attachment in the County Court of the county of Ouray, under which the premises in controversy were sold and the defendant's title derived, and of the decree of the District Court of Ouray county confirming that title. Every attitude assumed and every argument advanced by coun-

sel ultimately resolves itself into that proposition. Unless the power to thus assail these judgments can be established, the entire proceeding must fall to the ground. To establish it, the plaintiff must demonstrate that the courts rendering them were without jurisdiction; that they and each of them are of no force whatever, either *in personam* or *in rem*, and therefore void.

> "To make a judgment void collaterally, either (1) a legal organization of the tribunal, or (2) jurisdiction over the subject-matter, or (3) jurisdiction over the person must be wanting, or (4) one or more of these matters must have been lost after it once existed."
>
> Van Fleet on Collateral Attack, section 16, and cases cited.

We shall endeavor to show that every essential element to the validity of the judgments and decree in question, as outlined by Judge Van Fleet, and sustained by his authorities, is present in this record, and that the argument of plaintiff in error is founded upon the false assumption of the absence of one or more of them.

VALIDITY OF SERVICE ON AGENT IN ADJOINING COUNTY.

First. It is only upon the assumption that the judgments of the County Court are void that the plaintiff in error can support its attack upon them in an action of ejectment against the purchaser in possession. Both its original and amended replication

aver the want of jurisdiction of the County Court and seek to nullify all its proceedings. Its right to assail them collaterally would, indeed, be limited by that contention independent of its pleadings; for, as stated by this court in Cooper vs. Reynolds, 10 Wallace, 308,

> "It is a maxim of the law that when the judgment of a court is offered in evidence collaterally in another suit, its validity can not be questioned for errors which do not affect the jurisdiction of the court that rendered it."

Hence, if the County Court of Ouray county had jurisdiction either of the person of the plaintiff in error by the service of process, or of the property, obtained by a seizure under the lawful process of the court, or both, the plaintiff in error can not prevail.

The character and manner of service of the summons and writs upon the plaintiff in error have been correctly stated. The statutes, as far as they seem to be relied upon, have been correctly quoted. Others, however, seem to us to be important in determining whether the service was lawful; and to them we shall presently refer.

The position of plaintiff's counsel, as we understand it, may be thus summarized: Valid service upon a foreign corporation can be had only by delivering process to an agent in the county where the suit is brought, or, if no such agent can be found, then by delivering the same to a stockholder found in such county. A process agent designated under section 499, Mills' Annotated Statutes, must continue to re-

side at the corporation's principal place of business. If he removes from such county, he ceases to be such agent. Hence service upon him as such agent is void.

It is obvious that if these assertions are correct, there can be no service upon a foreign corporation which does not have either an agent or a stockholder in the county where suit is brought. It is equally obvious that if it has no stockholder in the state, and its only agent appointed under section 499 of Mills' Annotated Statutes has subsequently removed from the county of his original residence, no service of process is possible. Such results justify the inference that counsel's deductions are erroneous.

Section 38 of the Code, which provides for service of process, was enacted April 13, 1891, as an amendment to section 38 as it then stood. The amendatory act comprises three sections, of which 38-a and 38-b, of Mills' Annotated Code, are the last two. These sections are as follows:

> Sec. 38-a. "This act shall be liberally construed, and no service of summons shall be set aside or quashed for any technical error, defect or omission, either in the summons *or the service of the summons*, which error, defect or omission does not affect some substantial right of the defendant or defendants therewith served."
>
> Sec. 38-b. "All acts and parts inconsistwith the provisions of this act are hereby repealed; *but nothing herein contained shall be held to repeal any provision of the law now in force which authorizes or permits a*

summons to be served in any other county of the state than that in which the action is brought."

Appreciating the force and importance of the proviso of section 38-b, counsel have sought to confine it to special proceedings provided for by independent statutes not included within the Code of Practice; but no such narrow effect can be given to the section. The title of the act of 1891 is:

> "To amend section 38 of an act entitled an act to provide a Code of Procedure in civil actions," etc.

It is as much a part of the Code, therefore, as the section which it displaces. Not only so, but by the terms of section 38-a, it is to be liberally construed, and section 38-b expressly declares against the repeal of *any provision of law in force* authorizing or permitting a summons to be served in any other county of the state.

The Colorado Code does not require actions to be brought in any particular county, but it has provided for the place of their trial. By section 25, "actions for the recovery of real property," and by section 26 actions for statutory penalties and against public officers "shall be tried in the county where the subject of the action or some part thereof is situated," or "where the cause of action or some part thereof arose." By section 27 all other actions

> "shall be tried in the county in which the defendants or any of them may reside at the time of the commencement of the action, or

> in the county where the plaintiff resides when service is made on the defendant in such county, or if the defendant be a non-resident of this state, the same may be tried in any county in which the defendant may be found in this state, or in the county designated in the complaint, and if any defendant or defendants are about to depart from the state, such action may be tried in any county where plaintiff resides, or where defendant may be found and service had. Actions on book accounts or for goods sold and delivered may be tried in the county where plaintiff resides, or in the county where the goods were sold," etc.

The Supreme Court of Colorado has decided that this chapter provides the county where the action shall or may be tried subject to change of place of trial, and not where it must or shall be brought, and that no territorial limit is fixed by the Constitution or by the statutes of the state to the civil jurisdiction of either the District or County Courts. Hence, it is not a jurisdictional defect to bring an action in an improper county. The remedy is to change the venue to the proper county, which the court need not do of its own motion.

Fletcher vs. Stowell, 17 Colo., 94.

Section 34 of the Code outlines the contents of the summons, which, among other things, shall

> "require the defendant to appear and answer the complaint within twenty days after the

> service of the summons, if served in the county in which the action is brought, *or if served out of such county,* or by publication, within thirty days after the service of summons exclusive of the day of service."

It has been held that the service of process of a court upon a defendant within the state gives it jurisdiction of the person, and that valid personal service in an action may be obtained in any county of the state.

> Weiner vs. Rumble, 11 Colo., 607.
> Fletcher vs. Stowell, 17 Colo., 94.

Service by publication is authorized by section 41 of the Code, only

> "after summons is issued and the return thereon made that the defendant, after diligent search, can not be found. After such return, and not less than ten days after issue of summons, publication shall be made by order of the clerk of the proper court," in certain specified forms of action, but only upon "an affidavit stating that either the defendant resides out of the state, or has departed from the state without intention of returning, or has concealed himself to avoid the service of process."

Section 37 of the Code declares that

> "the summons shall be served by the sheriff of the county where the defendant is found, or by his deputy," etc.

That this requirement is not limited to natural persons will be apparent upon applying to it certain clauses of our corporation act.

By section 499, Mills' Annotated Statutes, foreign corporations, upon complying with its conditions, "shall be subjected to all the liabilities, restrictions and duties which are, or may be, imposed upon corporations of like character organized under the general laws of this state, and shall have no other or greater powers."

Section 503 provides that "suits may be instituted and prosecuted by and against any corporation formed or recognized (organized) under this act, in the same manner and like cases as natural persons."

Section 506, Mills' Annotated Statutes, prescribes the method of service in suits against any corporation, which, as to such method, has been repealed by the Code.

Little Bobtail Co. vs. Lightbourne, 10 Colo., 430.

It also contains a provision, "*that the plaintiff may, in all cases, bring his action in the county where the cause of action accrued.*" This proviso has never been repealed, either expressly or by implication.

It is manifest, from a consideration of these sections:

First—That a foreign corporation, complying with the requirements of section 499, is subjected to all the liabilities, duties and restrictions imposed upon domestic corporations of like character.

Second—That suits may be instituted and prosecuted by or against any such corporations in the same manner and in like cases as natural persons; and

Lastly—As natural persons may bring suits of a personal character wherever they reside, where the contract was made or is to be performed, or where the defendant resides or may be found, it follows that actions may be instituted and prosecuted against foreign corporations either in the county designated by them as the principal place of business, or in any other county where a suit could be brought by or against a natural person, and may be served by the sheriff of the county where it is found. The saving clause of section 38-b was, therefore, intended to, and does, relate not only to the other provisions of the Code, but as well to the above sections of Mills' Annotated Statutes. Inasmuch as the execution under which the premises in question were sold issued upon the judgment in the case of Begole Mercantile Co., a corporation, vs. the plaintiff in error, we are largely concerned with the record in that case. The complaint (Transcript, page 66) alleges that the plaintiff company was a domestic corporation doing business in the city and county of Ouray, state of Colorado. For its second cause of action it alleges that the defendant was indebted to the San Juan Hardware Co., a corporation, doing business in said city and county of Ouray, which indebtedness was assigned to the plaintiff. The suit, then, was brought by the plaintiff, at its place of business and residence, against the defendant company, in the county which it designated as its principal place of business, for the amount of its claim. The conclusion is inevitable that the contracts forming the basis of the suits were made with the defendant in Ouray county, and that the goods were delivered to it therein. The summons (Trans-

script, page 69) in that case, addressed to the defendant, commanded it to appear and answer the complaint within twenty days, if served within the county, or, if served out of the county or by publication, within thirty days after the service thereof, if served within the county, etc. Were the defendant a natural person no question could be raised as to the validity of the service of the summons beyond the limits of the county. As the statutes place all corporations on the same level with natural persons for the purpose of suit, service of summons outside of Ouray county, if the agent of the defendant is not found therein, brings it as fully within the jurisdiction of the court as though it were a natural person. The default was taken upon such service June 14, 1895. (Transcript, page 36.) And the court expressly adjudged therein that summons had been served upon one J. M. Jardine, the heretofore duly authorized and acting agent for said company. Judgment was thereupon entered after the introduction of testimony. It appears that the lawfulness of the service and the truth of every averment of the complaint was proven to the satisfaction of the court, and the judgment, importing absolute verity, is conclusive against all parties hereto.

Frick Co. vs. Wright (Tex.), 55 S. W., 608.

Exhibit R, so greatly relied upon by plaintiff in error, was filed by Jardine on May 27th. (Transcript, page 96.) He admits service of the summons and writ of attachment upon him May 8, 1895, but alleges non-agency by reason of change of residence. The default and judgment having been entered on June 27,

1895, thereafter, its recitals show *inter alia* an adjudication of valid service.

The records of the other suits in attachment are, in all substantial recitals, identical with that of the Begole case.

We contend, under these statutes, the plaintiffs in the attachment cases rightfully brought their actions in Ouray county, and that the service of process in San Miguel county upon the agent of the plaintiff in error, duly designated for that purpose, he being found therein, was sufficient to give the court jurisdiction for its subsequent proceedings. No substantial right of the plaintiff in error was affected, and the right to make such service was expressly recognized by section 38-b of the Code. Of course, service thus made extended the defendant's time for answering to the period of thirty days after service.

In his return of the process issued in the Begole case, on April 26, 1895 (Transcript, page 39), the sheriff of Ouray county certified that he was "unable to make service of the within writ on the within named defendant, there being no person within my said county upon whom process might be served."

On the 7th day of May thereafter (pages 68-70) both the writ and summons were served by the sheriff of San Miguel county by delivering the same to J. M. Jardine, "the duly authorized agent of the defendant company."

By section 499, Mills' Annotated Statutes, foreign corporations are required, before they are authorized or permitted to do business within the state, to make and file a certificate, signed by the president and secretary of such corporation, duly acknowledged, etc.,

designating both the principal place where the business of said corporation shall be carried on in the state, and *"an authorized agent or agents in this state," residing thereat, upon whom process may be served.*

This section merely emphasizes the constitutional mandate that

> "no foreign corporation shall do any business in this state without having one or more known places of business and an authorized agent or agents in the same upon whom process may be served."
>
> Colorado Constitution, article XV, section 10.

This section is complied with whenever a certificate, signed and acknowledged by the president and secretary, substantially setting forth its requirements is duly filed and recorded.

> Goodwin vs. Colo. Mortgage Co., 110 U. S., 5.

A foreign corporation, having done this, is presumed to be doing business in the state, and its right to do so can not then be gainsaid. None of its stockholders are required to reside in the state, nor is it obliged to have more than a single agent. Like domestic corporations, it may be sued in any county in the state subject to a change of place of trial. If counsel's construction of section 38 of the Code be correct, it would follow that no action could be brought against a foreign corporation, the laws of the state to the con-

trary notwithstanding, except in the courts of the county wherein such agent resides, unless the latter should be found in some other county. In that event the courts of the latter county would alone have jurisdiction, and creditors of the concern would be compelled to go wherever the whim or the fancy of the agent should take him. In Colorado Iron Works vs. Sierra Grande Mining Co., 15 Colo., 499, which was a suit brought to recover a balance due for goods sold and delivered, the sheriff served the summons by delivering a true copy to one Samuel Alsop, a stockholder of the defendant company. He further certified that the defendant corporation kept no principal office in any county of the state; that there was no county in which its principal business was carried on, no president, vice-president, secretary, treasurer, cashier, general agent, superintendent or agent thereof, could be found in the county, but that each and every officer was absent therefrom. The defendant, a foreign corporation, moved to quash the return of the summons, among other reasons, because Alsop was neither an officer nor stockholder of the defendant. It appeared that Alsop had gratuitously transferred his stock to trustees whose names he did not know, and had contributed $50 to cover the expenses of the transfer. The service was, nevertheless, sustained. The provision of the Code then in force provided that if the suit be against a foreign corporation doing business within the state, service should be made by delivering a copy of the writ to an agent, cashier, treasurer or secretary thereof. In the absence of such agent, treasurer or secretary to any stockholder.

"We can not agree with the counsel of appellee," said the court, "that the District

> Courts of this state are courts of limited jurisdiction, and that their jurisdiction over foreign corporations is dependent upon the voluntary acts of such corporations in placing themselves under such jurisdiction by complying with the requirements of section 260, General Statutes. (499 Mills.) They are courts of general jurisdiction, but depending, in obtaining such jurisdiction over corporations, upon the statute in so far as the statute departs from the common law in providing in what manner service can be had."

We contend that under section 499, Mills' Annotated Statutes, service upon a designated process agent, wherever found in the state, gives the court jurisdiction. Under section 38 of the Code service upon any agent in the county where suit is brought, or, in his absence, upon a stockholder therein, is equally effective. Neither statute is exclusive. Any other rule might exempt foreign corporations and their property from the jurisdiction of every court in the state.

State vs. Hannibal R. R. Co., 51 Mo., 532.

SERVICE UPON JARDINE SUFFICIENT.

In Henrietta M. & M. Co. vs. Johnson, 173 U. S., 221, it was held that personal service of summons made in the territory of Arizona on the general manager of a foreign corporation in that territory was sufficient service under the laws thereof to give its

courts jurisdiction. It was there contended that the provisions of the Code of Arizona regarding service were not applicable to foreign corporations, and that no service was effectual unless made upon the agent required by section 348 of the Revised Statutes, to be appointed for that purpose. The court held the language of section 348 to be permissive merely.

In the case of Venner vs. Denver Union W. Co., 15 Colo. App., 495, cited by counsel, it was held that service of summons on a foreign corporation can only be made by delivering a copy of the writ to an agent of the corporation found in the county in which the action is brought, or to a stockholder in that county, and that under no condition can service of summons be made upon the vice-president of a foreign corporation. The case is not in point, the only question being whether the proper person in the county was served. If the return upon the original summons had disclosed the existence of neither agent nor stockholder within the county, while the second writ recited service upon the duly authorized agent in another county, would a judgment based thereon have been held void for want of jurisdiction? We think not.

No reference is made in the Court of Appeals' decision either to sections 37, 38-a or 38-b of the Code, or to section 499, Mills' Statutes. The agency of the vice-president who was there served is arbitrarily denied. The decision is entitled to respect, but it is not a decision of our court of last resort. Besides, the real question there involved was as to the validity of service on Venner, vice-president, while casually in the state, and the *question of service on a designated agent was not discussed.*

In the case of Calhoun vs. Ajax Co., 27 Colo., 1, the Supreme Court of Colorado declared that where the decision of a tribunal is subject to review by one having superior authority over it for that purpose, or the same question may be passed upon by the superior tribunal in another case, the doctrine of *stare decisis* does not apply with full force till the question has been determined by the court of last resort.

Brown vs. Tourtelotte, 24 Colo., 204.

Davidson vs. La Plata County, 26 Colo., 549, 554.

Acting upon the authorities last cited, the District Court of the city and county of Denver, in Venner vs. Denver U. W. Co., which presented the identical question relating to the same judgment, declined to accept the action of the Court of Appeals as final. On the contrary, after an exhaustive hearing and argument, it sustained the validity of the decree based upon such service, and the case is now pending in the Supreme Court for final determination.

We quote from the opinion of the district judge:

> "Upon reason and authority, therefore, I am thoroughly satisfied that paragraph 260, General Statutes (section 499, Mills' Annotated Statutes), does not furnish an exclusive or even a preferred method of service, but that its sole purpose is to secure within the state the presence of a representative of each foreign corporation doing business here, upon whom process may be served with cer-

tainty, when it can not be served in any other of the methods provided by law; and that, under the statutes of this state, as they have existed since 1891, in an action against a foreign corporation which has designated an agent in compliance with said paragraph 260, the plaintiff has his option to cause service to be made either upon such designated agent or upon any other agent of the corporation who may be found in the county in which the action is brought."

In Mutual Life Ins. Co. vs. Spratley, 172 U. S., 602, this court has held that if it appears that there was a law of the state in respect to service of process upon foreign corporations, and that the character of an agency of a foreign corporation is such as to render it fair, reasonable and just to imply an authority on the part of the agent to receive service, the law will, and ought to, draw such an inference and imply such an authority, and service under such circumstances and upon an agent of that character is sufficient. Surely it can not be maintained that an agent designated for the identical purpose can not be served with process in a suit brought in Colorado against a corporation because he was served beyond the limits of the county in which the suit was brought, and especially when it appears that the defendant had neglected to appoint another agent within the county limits, and that no representative or stockholder of the company was at the time within said county.

Indeed, we might insist that if any exclusive method of service on foreign corporations is provided for, an agent thus appointed is the only one capable

of being served. This would be the case were not the statute providing for his appointment, in its language, permissive as to the manner of process. Thus it is held that if the law of a designated state requires a foreign corporation to appoint an agent within such state for the service of process, and empowered to receive service, service must be had upon that agent alone.

Baile vs. Equitable Fire Ins. Co., 68 Mo., 617.

Stone vs. Travelers Ins. Co., 78 Mo., 675.

The contention of counsel that section 38 of the Code, permitting service upon any agent of a foreign corporation contravenes the fourteenth amendment, is both curious and inconsistent. Curious because every authority relating to the subject recognizes the absolute power of the states to make any regulations they may see fit relating to foreign corporations doing business within their limits. Inconsistent, because the attachment records are assailed, in that service was not made upon some agent in the county where the suit was brought as the statute requires.

But does not this assertion of the unconstitutionality of the Code section justify the action of the attaching plaintiffs in serving process upon the "duly authorized" agent designated as required by the state Constitution and section 499 of Mills' Annotated Statutes? Instead of censure, they should receive credit for pursuing the only course which, under plaintiff's concession of the character of the Code requirements, was open for the service of process upon the company.

Not one of the six cases cited in aid of this proposition remotely supports it. None of them declare

that a state may not, if it desires, provide for service of process upon any agent of a foreign corporation doing business within its limits. They apply existing provisions of law to conditions revealed by the record.

Mr. Thompson says that whenever the law of the domestic state requires the foreign corporation, as the condition of doing business within the state, to appoint an agent and empower him to receive service of process and lodge evidence of such appointment with the secretary or other officer of the state, then, unless the language is *permissive*, so as to admit of other modes of service, it must be had on that officer alone, or there will be no jurisdiction.

6 Thompson on Corporations, section 8025.

He also, section 8028, asserts it to be a settled principle of American jurisprudence that, where a state imposes upon a foreign corporation as a condition precedent to its right to do business and make and take contracts within the state, the appointment of a resident agent within the state, with power of attorney, to receive service of process in actions against it brought therein, a judgment in personam against the corporation founded upon a service of process upon an agent so appointed will be good not only within the state in which it was rendered, but within every other state including the state creating the corporation.

If the general assembly of Colorado could, by statute, limit service of process on foreign corporations to agents or officers found only in the county where suit is brought and the place of business, and agent authorized to receive service were designated for some other county, it could thereby nullify the Constitution

itself; for, as we have seen, that instrument fixes the conditions under which foreign corporations may do business, one of which is the authorization of an agent or agents upon whom process may be served. The general assembly may add other modes of service; it can not deny to litigants the method provided by the organic charter of the commonwealth.

In Eagle Life Ins. Co. vs. Redden, 25 So. (Ala.), 779, service was "executed by handing a copy to Robert Cox." The defendant defaulted. Proof was offered that Cox, at the time of service, was local agent of the defendant in Elmore county, and judgment was entered for plaintiff. The Code provided that, "when the suit is against a corporation, the summons may be executed by the delivery of a copy of the summons and complaint to the president or other head thereof, secretary, cashier, station agent, or any other agent thereof." Other Code provisions existed relating specially to foreign corporations and mode of service thereon. They were held to be cumulative, "for the greater convenience of those who desire to institute legal proceedings against such corporations;" a conclusion as applicable to the recitals of Mills' Annotated Statutes, section 499, as to those of the Alabama Code.

The Supreme Court of South Carolina has construed the acts of 1887, providing that "service can be made, in respect to a foreign corporation, only when it has property within the state, or the cause of action arose therein, or when such service shall be made in this state upon the president or any agent thereof," and of 1893, that foreign corporations carrying on business in the state shall file in the office of the sec-

retary of state a declaration designating some place within the state at which legal papers may be served on said corporation; and held that service within the state upon the resident agent of a foreign corporation owning property in the state, at a place other than that designated in the declaration filed in the office of the secretary of state, in a cause of action arising in the state, was valid. The effect of the act of 1893 was "to extend the facilities for serving a foreign corporation, instead of diminishing them; for, as we have seen, under the provisions of the Code above cited, a foreign corporation could only be made a party to an action by personal service on certain designated officers or agents within the state, while, under provisions of the act of 1893, the service may be made by delivery of the papers to be served to any officer, agent, or even employe, of the corporation found in the premises designated as its place of business," etc.

Littlejohn vs. Southern Ry., 22 S. E. (S. C.), 761.

Jones vs. Ins. Co., 88 N. C., 499.

Howard vs. Ins. Co., 37 N. Y. Supp., 832.

Silver vs. Western Assurance Co., 38 N. Y. Supp., 335.

Clinard vs. White, 39 S. E., 960; 129 N. C., 250.

Section 1323 of the Arkansas statute requires a foreign corporation, to entitle it to carry on business in the state, to designate an agent upon whom service may be made, etc. Section 5672 providing that service of process on a foreign corporation, having an agent in the state, may be made on such agent, service

of summons on an agent in charge of the business of a foreign corporation at a certain place where the matters complained of occurred, was sufficient, though defendant had designated another agent on whom service might be made, as required by section 1323.

Lesser Cotton Co. vs. Yates, 63 S. W. (Ark.), 997.

It is evident, from the statutes and the authorities cited, that two methods of service of process upon foreign corporations being given, the one by section 499, Mills' Annotated Statutes, the other by section 38 of the Code, if service be made upon the person designated by the former as "the agent upon whom process may be served," it is good, without regard to the county in which such service may be had. If made under section 38 of the Code, it should be made in the county where the suit is brought, and, if such agent can not be there found, it may be made upon a stockholder in such country. Neither method is exclusive. In the one it is expressly provided that process "may be served" on the designated agent. In the other the specific mode of service provided is expressly declared not to repeal any provision of law in force permitting summons to be served in any other county in the state. No case can be found which decides that, if a foreign corporation is amenable to process at all, the service thereof on the designated process agent is bad.

A number of cases have been cited in which service of process beyond the limits of the county in which suit was brought is invalid. But in every instance it will be found that, by the general laws of the state, or those creating the particular court its process was

expressly limited to the county of the suit, or the jurisdiction of the court is expressly limited to that county.

All of those cited from Arkansas, for example, are controlled by the statute declaring that service can be had only in the county in which the suit is brought, which county must be that in which the defendant resided or was served. This is jurisdictional. The same is true of Florida and Missouri.

Many of the cases relate to summons from justices of the peace, served outside of county or township jurisdictions. They are not at all pertinent here.

It is only when the irregularity of service is so great as to amount to no service at all that the judgment based thereon is void.

1 Black on Judgments, 224, and cases cited.

In Brown vs. Chapman, 17 S. E., 855, 90 Va., 174, process against defendant had been directed to an officer of another county than that where the action was brought, in violation of section 3220 of the Code. A judgment rendered on such service was, though erroneous, sustained against a bill to enjoin proceedings under it.

Process issued by the courts of Colorado is addressed to no particular officer, but runs to all of them, and is confined to no particular county. If service is made in violation of the provisions of the Virginia Code, though unlawful, is sufficient to protect a judgment rendered thereon from extraneous attack, *a fortiori*, in Colorado service in an adjoining county, there being no statute prohibiting it, gives jurisdiction, and a judgment thereon would be sustained, even against direct attack.

JARDINE WAS PROCESS AGENT AT TIME OF SERVICE.

But it is also objected that Jardine was not at the time of service an agent of The Cosmopolitan Mining Company. This objection is based, first, upon Jardine's removal from Ouray county; and, second, that the company was not doing business in the state at the time of such service.

If it be true that a process agent of a foreign corporation forfeits his appointment by a change of residence from one county to another in the same state, the contention of plaintiff in error may be good; but there is nothing in the nature of the proposition, in the requirements of the statute, or in the language of any authority, to support the claim. The purpose of the appointment can be subserved in one county as well as in another, so long as the agent remains a resident of the commonwealth; for we have seen that, under the Colorado Constitution, the territorial jurisdiction of District and County Courts is coextensive with the boundaries of the commonwealth, and all persons within such boundaries are amenable to their jurisdiction. Hence the process agents of foreign corporations are amenable to service wherever found within the state. This view is strengthened by the fact that the statute provides for the appointment of an agent or agents *"in the state,"* etc.

If by moving from one county to another a process agent loses his commission, it would be easy for a foreign corporation to avoid service of process by prompting such removal, and to defeat jurisdiction by declining to make a second appointment; for the statute is silent as to a second designation, either as

to place of business or of an agent. Such a requirement may be implied, but not from the mere change of the agent's habitation.

The statute requires the selection of an agent residing at the company's principal place of business. It does not require the residence to be continuous. For purposes of convenience it might be desirable. For all practical purposes it is entirely unnecessary.

The zeal and diligence of counsel have failed to discover a single authority to support their assumption. They can easily discover a number in conflict with their claim and involving analogous conditions. As well might it be said that the president or manager of a corporation ceases to be such by taking up his residence elsewhere. Nothing short of death, resignation or removal from the state, or removal of the agent by direct act of the principal, the dissolution of the company, or its formal and complete withdrawal from the state, could operate as against third persons to cancel the agency thus created. By the laws of New Mexico, insurance companies were required to appoint an attorney at law in each county where its agencies were established, and to file with the territorial auditor an instrument authorizing such attorney to accept service, and also consenting that any service of process on such attorney should be taken and held to be valid as if served upon the company. An insurance company filed an instrument designating F. H. Kent & Co as its attorneys at Albuquerque, upon whom process could be served. Neither of them had been admitted to the bar. Shortly afterwards the firm dissolved, Kent continuing to do business at the same place under the same name. Service was made upon Kent against the com-

pany, and judgment obtained thereunder. Suit was then brought upon the judgment in the state of Massachusetts, where it was alleged in defense that the power to receive service was to the partnership, and not to Kent. Also, that Kent was not an attorney at law, and that the dissolution of the firm terminated the agency. The Supreme Court of Massachusetts said:

> "Taking into consideration its evident purpose, and its utter futility, if a company appointing an agent to receive service could, by an act known only to the agent and itself, withdraw its powers, it must be held that this appointment was irrevocable, unless the revocation might be made by the appointment, duly notified upon the public records, of a new agent who should be competent to receive service of process in regard to any controversies arising upon contracts previously entered into. No such act as this was done when the service of process was made. F. H. Kent & Co. were still held out by the public records as the agent on whom process might be served."

The judgment was enforced *in personam.*

Gibson vs. Manufacturers' Ins. Co., 10 N. E., 729; 144 Mass., 81.

The Supreme Court of Iowa, in the case of Green vs. Equitable Life, etc., Assn., 105 Iowa, 628; 75 N. W., 635, has expressly approved the principle enforced in Gibson vs. Ins. Co. This was an action on a foreign judgment rendered in North Dakota, upon serv-

ice upon an agent duly appointed under the laws of that state to accept and acknowledge service. Upon this proposition the court said:

> "Some claim is made to the effect that, although Carey was an agent for the defendant, with power to accept service of mesne and final process, that power did not authorize the service of summons upon him, especially as he did not accept service of it. In executing and filing the power of attorney which appointed Carey, it must be presumed that the defendant intended to comply with the law of the state, which provided for the appointment of an agent authorized to accept the service of process, 'and upon whom service of process might be made.' The power of attorney executed and filed did not, in terms, state that service of process might be made upon Carey, but it appointed him the agent of the defendant for the purposes of service of process, and the language used does not, in terms, exclude the right of parties to serve process upon him. The defendant, having undertaken to comply with the statute, and having done business under the appointment of Carey, which it filed, should not now be heard to say that, by reason of technical defects, the appointment made did not comply with the statute. Gibson vs. Ins. Co., 10 N. E., 729."

It is true that, by a statute of North Dakota, it was provided that where a foreign corporation ceased

to do business, the attorney last designated shall be deemed to continue as such for the purpose of receiving process for actions on liabilities previously created, in which respect it differs from the case at bar; but when it is considered that the company's principal place of business in the state was alleged in the record, and that the company's property was attached by due process of law, the doctrine of the Iowa case is here applicable.

In Eureka Land, etc., Co. vs. Yuba Canal Co., 66 Cal., 311; 5 Pac., 490, service upon the duly appointed agent as shown by the record was sustained, though at the time such person was not in fact such agent.

> "To hold otherwise would be to permit a foreign corporation to set at defiance all processes."

Timolate vs. Held Co., 10 Lea (Tenn.), 436.

Parker vs. Bethel Hotel Co., 96 Tenn., 252.

Parsons vs. Buffalo Mills, 29 N. Y. App. Div., 45.

In the case at bar designation of Jardine was made, as the statute requires, and no other appointment having been made, this agent was still held out to the public as the one upon whom process might be served at the time the suit was brought. (Transcript, pages 32-33.) The recognition of any other than the rule announced by the Supreme Court of Massachusetts would defeat the evident purpose of the statute itself.

> "This language does not confine the service to an agent who has been expressly an-

thorized to receive service of process upon him in behalf of the foreign corporation. If that were true, it would be easy enough to determine whether the person represented the corporation, as unless he had been so authorized he would not be its agent in that matter. In the absence of any express authority, the question depends upon a review of the surrounding facts, and the inferences which the court might properly draw from them. If it appear that there is a law of the state in respect to the service of process on foreign corporations, and that the character of the agency is such as to render it fair, reasonable and just to imply an authority on the part of the agent to receive service, the law will, and ought to, draw such an inference and to imply such authority, and service under such circumstances and upon an agent of that character would be sufficient."

Insurance Co. vs. Spratley, supra.

In People ex rel. vs. Justices, etc., 11 N. Y. Sup., 773, it was held that, although the city court of New York was not expressly empowered to issue its writs beyond the county limits, yet, having jurisdiction of actions against corporations, service of the writ in the pending case upon the insurance commissioner at Albany was sustained as essential to effectuate such jurisdiction.

If counsel's contention that the record fails to show that The Cosmopolitan Company was doing business in the state at the time of suit brought, and that the appearance of such fact is essential to the validity

of the judgment, is sound, the service of summons, however made, would become unimportant. This part of counsel's argument seems to constitute its principal feature, and the one point upon which the plaintiff in error chiefly relies for a reversal. The principle announced in St. Clair vs. Cox by this court is not only applied to the case at bar, but sought to be extended far beyond its original scope.

In the case of Mutual Life Ins. Co. vs. Spratley, this court, commenting with approval upon the case of St. Clair vs. Cox, said:

> "The case does not hold that a foreign corporation can not be sued in any state unless it be doing business there, and has appointed an agent expressly that process might be served upon him for it.
>
> "If it is doing business in the state, *or if, in compliance with the statutory conditions precedent for doing business, it has appointed an agent, and thereby consented that process might be served upon him*, jurisdiction may be acquired by service of process upon such agent, so that a judgment rendered thereon will be effective as a personal judgment."

In Barrow Steamship Co. vs. Kane, 170 U. S., 107, this court, pointing out the manifest injustice that would ensue if a foreign corporation, permitted by the state to do business therein and to bring suit in its courts, could not be sued in its courts, and thus, while allowed the benefits, would be exempt from the burdens of the state, in consequence of which many states have been induced to provide by statute that

a foreign corporation *making contracts within the state* shall appoint an agent residing therein, upon whom process may be served in actions thereupon, said:

> "This court has often held that wherever such a statute exists, service upon an agent so appointed is sufficient to support jurisdiction of an action against a foreign corporation, either in the courts of the state, or, when consistent with the acts of Congress, in the courts of the United States held within the same."

See, also,

Frick Co. vs. Wright, supra.

From these expressions we are justified in contending that the principle of St. Clair vs. Cox can not be, and never was, intended to apply to foreign corporations which have complied with local statutes and designated process agents thereunder. These form a distinct class, and when they have made compliance with the local requirements, they are subject to suit, and judgments in personam may follow, where jurisdiction has been acquired by service on such agent.

Nothing in the record warrants the several assertions of counsel that Walsh knew or had notice that Jardine was not the agent of the company. The only excuse for them is Exhibit R, which, as we have heretofore shown, was notice of nothing. Walsh was a stranger to the proceedings. It does not even appear that he was in Ouray county when the actions were brought or judgments taken. He had no knowledge of Jardine's residence, or change of residence. The

only information he could have had was that disclosed by the records of the office of the secretary of state and the recorder of the county, both of which confirmed the existence of the agency.

But how can plaintiff have taken advantage of such knowledge, even if it existed? We are not charged with fraud or double dealing. If Jardine was the agent, the service should have been made upon him. If he was not, Walsh's knowledge is immaterial. He has the rights of a purchaser for value, and, as hereafter shown, is entitled to the protection of the record. If he knew of any fact or facts invalidating the judgments or the jurisdiction of the court, and not shown by the record, the plaintiff should have alleged and proved them. It did neither.

"DOING BUSINESS."

We contend that the record of the Ouray County Court judgments shows full compliance with the requirements of St. Clair vs. Cox, as thus defined. These requirements are that either in the application for the writ, or accompanying its service, or in the pleadings, or in the findings of the court, it should appear that the corporation was engaged in business in the state. It is immaterial how or where the fact appears, or in what language it is expressed. What is, and what is not, doing business within the limits of the state has been the subject of much controversy.

The plaintiff company was organized for the purposes of

> "buying, owning, selling, leasing, working, developing and improving gold, silver, copper or other mines, and purchasing and hold-

ing such other property as may be necessary or convenient." Exhibit O, Transcript, page 27.

Counsel have made copious quotations from the record, the appendix to their brief comprising sixty-four pages. It is significant that they have omitted, both from their statement of facts and from the appendix, a copy of or any reference to Exhibit O. We are in the bounds of fair criticism in remarking that they should have apprised the court of the objects of the plaintiff in error in connection with their reiterated assertion that it was not doing business in Colorado, when summoned by its courts to answer the claims of its creditors.

At and before the time of the bringing of the attachment suits it had complied with the requirements of the Colorado Constitution and statutes, and was "*owning gold and silver mines*" in Ouray county. A part of its business, that is to say, a part of its corporate powers, was the ownership of mining claims. It complied with the statutes of the state for that, among other purposes, and the fact of its ownership was apparent from the fact of the attachments.

In Fritts vs. Palmer, 132 U. S., 282, it was held that the constitutional and statutory provisions of Colorado concerning corporations were valid in so far as they did not directly affect foreign or interstate commerce, and that the company involved therein violated the laws of the state when it purchased property therein without having previously designated its place of business and an agent. It is true that it was held that the deed was not thereby necessarily made absolutely void for every purpose; nevertheless, the duty to comply with the statute as

a condition precedent to the ownership of property was clear. The doing of business is the performance of one or more of the functions of a corporation within the jurisdiction of a state. The ownership of property is as much one of its functions as the working or operation thereof, and that fact appearing, it is sufficient for the purposes of this case.

In several complaints in the Ouray county cases the allegation is made

> "that the defendant is a corporation duly incorporated and organized under and by virtue of the laws of the state of Maine, with its principal office in the state of Colorado, at Ouray, in said Ouray county."

The principal office referred to can be no other than that which the statute requires to be designated as "the principal place in the state where the business is to be carried on." Being a foreign corporation, the allegation could refer to no other, and, the defendant having defaulted, affirmative proof of the allegation, although unnecessary, was received. Then, too, the return of the sheriff shows service upon "the duly authorized agent of the company." His Honor Judge Marshall, in admitting these records, said:

> "In each of the complaints is an averment that the corporation is a corporation duly incorporated and organized under and by virtue of the laws of the state of Maine; that its principal office in the state of Colorado is in Ouray, in said Ouray county. I take it that the maintaining of the principal office there is the being found within the state."

The doing of any one or more of the things enumerated in the articles of incorporation as comprising the objects of the organization is the doing of business. If buying, owning and selling property are parts of its purposes, its ownership of and holding property is as much an exercise of its corporate powers as would be the negotiations for purchase, or the sale thereof.

The main purpose of the statute requiring the selection of a principal place of business, and the designation of a process agent, was to avoid the contention now made, and it does avoid it. Observance of these conditions by a foreign corporation domesticates or naturalizes it; makes it, by virtue of such compliance, "subject to all the liabilities, restrictions and duties which are, or may be, imposed upon corporations of like character, organized under the general laws of this state." To hold otherwise is to give such a corporation "other and greater powers" and privileges, although prohibited by the identical section prescribing conditions under which it may do business at all.

In Utley vs. The Clark-Gardner Gold Mining Co., 4 Colo., 369, a construction was given to the statutory phrase "doing business," occurring in section 499, Mills' Annotated Statutes. The court said:

> "Taking language in its ordinary acceptation, a corporation does business by the exercise of its power to contract, its power to acquire and hold property, real and personal, and like powers. By the exercise of these corporate powers, it carries on its corporate business in the ordinary meaning of the term. By their exercise, it establishes

> its business relations, assumes obligations and acquires rights."

This decision was here virtually approved in Fritts vs. Palmer, cited supra.

The case of Jones vs. The Aspen Hardware Company, 21 Colo., 263, involved a construction of section 1 of the Colorado act of 1887, page 406, which required every corporation incorporated under any general or special law of the state, or any foreign country, or of any state or territory of the United States having capital stock divided into shares, to pay a certain fee on the amount of such capital stock to the secretary of the state, on filing its certificate of incorporation, and prohibited them from exercising any corporate powers or doing any business in the state until the fee was paid. The Aspen Company, without complying with this statute in its corporate capacity, took a conveyance of property to itself, which property was afterwards attached by a creditor of the grantor. The court said:

> "The taking of title to the property in controversy being the exercise of a corporate power, and as such forbidden until the fee for filing has been paid, it follows that the title of the Aspen Hardware Company, as a corporation, can not be upheld."

The Supreme Court of Missouri, in Missouri Lead Mining and Smelting Company vs. Reinhard, 114 Mo., 218; 35 Am. St. Rep., 746, was confronted with the question whether a foreign corporation, empowered by its articles to purchase, hold and operate mining lands in a certain foreign state, or elsewhere, was authorized to purchase and hold realty in the state of

Missouri. The court said:

"According to the record before us, there could be no doubt but the laws of that country (Great Britain) gave to this corporation the power to purchase, hold and operate mining lands in this state. There is nothing in the laws of this state denying to it the right to exercise those powers here * * * The memorandum of association provides that the registered office of this company is to be in England, and that the objects for which it is established are: 1. To adopt and carry into effect the agreement of the 8th of April, 1879, before mentioned. 2. To purchase or otherwise acquire and work any mines, minerals and mining rights, lands, hereditaments and chattels in the state of Missouri, in the United States of America, or elsewhere. 4. To purchase, sell and deal in lead and lead ores and other metals and metallic ores, and generally to carry on the business of mine owners and workers of and dealers in the products of mines.

"There is no doubt but that this corporation was organized for the primary purpose of purchasing and operating these particular mining lands in this state, but its business in the purchase and operation of mines is not restricted to this state. This is clearly shown by the words 'or elsewhere,' meaning elsewhere than in this state. This is the more apparent from the fourth paragraph: for in that no allusion whatever is

made to any locality. This company has, we conclude, the power to purchase and operate mining lands in England as well as in this state. * * * This corporation has its registered office in England, and holds its corporate meetings and can transact much of its business there. The fact that some portion of its business, namely, the purchase and operation of mining lands, can be carried on here and here only, is immaterial. It has, by the law of the place of its creation, the power to do such business here, and that business is not opposed to the policy of our laws, and we have no statute which denies to it the right to carry on such business here. This corporation, therefore, had and has the right to purchase, hold and operate these mining lands."

In Commonwealth vs. Gloucester Ferry Co., 98 Pa. St., 105, it was decided that a foreign ferry company is doing business in a state where it has leased a slip or wharf at which its boats touch for the reception and disembarkation of passengers and freight, although it does nothing else within the state. It seems clear, therefore, both on principle and authority, that the exercise of any of its corporate powers by a foreign corporation, after complying with the statutory conditions precedent of another state, is doing business within the comprehension of that term as used in the statute.

The Supreme Court of Alabama, in Beard vs. Union Publishing Company, 71 Ala., 60, declared that to constitute a doing of business within the state,

"there must be a doing of some of the works, or an exercise of some of the functions for which the corporation was created."

This decision has recently received the sanction of this court in Chattanooga, etc., Assn. vs. Denson, 189 U. S., 408.

The Santa Clara Female Academy vs. Sullivan, 116 Ill., 375, construes the phrase "doing business in this state," which is identical with the expression in the Colorado statute upon that subject, and holds:

"That receiving a devise of real estate is doing business in the state within the meaning of the statute. The decision calls attention to the fact that under the laws of Illinois, no discrimination against foreign corporations shall exist, but they are placed on the same footing with domestic corporations, and are given, by implication, equal powers, and places them under the same restrictions. Among other things it says, at page 384:

"'By declaring that foreign corporations shall have no other or greater powers, there is a direct implication that they shall have equal powers with domestic corporations of like character.'

"In Stevens vs. Pratt, 101 Ill., 217, this court says:

"'The manifest and only purpose (of this section 26) was to produce uniformity in the powers, liabilities, duties and restrictions of foreign and domestic corporations

of like character, and bring them all under the influence of the same law.'

"As the section reads, foreign corporations 'doing business in this state,' it is said this corporation is not embraced therein, as it is not doing business in this state. *Receiving lands in this state by devise and the assertion in the state of ownership over them, we regard a sufficient doing of business in this state to bring appellant within the purview of this language of the section.*"

As the receiving of lands is the doing of business, so, also, must be the holding of them after such receipt.

PRESUMPTIONS.

When a foreign corporation complies with the requirements of a domestic statute as precedent conditions to the doing of business by designating a principal place and appointing a process agent, which facts appear in the record, its cessation from business and withdrawal from the state will not be presumed. Such presumption, at least, can not form the basis of collateral attack upon a judgment, the record of which shows these conditions. The judgment which was attacked in St. Clair vs. Cox was founded upon service made upon an agent of the defendant company. The company had not complied or pretended to comply with the requirements of the Michigan statute, permitting foreign corporations to do business within its boundaries. The person upon whom process was

served was not a designated agent. There was nothing in the record to show that the company ever had been, or then was, doing business in the state, or had ever been present in the state in any capacity whatsoever. The judgment, as a personal one against the company, was, therefore, not sustained.

An insurance company, after complying with the statutes of Kentucky, was subsequently denied the right to continue business there, but continued the collection of premiums on policies previously written. Service upon statutory agent was made in cases subsequently brought against it, the validity of which was recognized by the state, but denied by the federal Circuit Courts.

In Mutual Reserve Association vs. Phelps, 190 U. S., 147, the service of summons upon the insurance commissioner against the insurance company was sustained, as giving jurisdiction of the defendant, although its license had been canceled by the insurance commissioner. This decision, we think, is the last expression of this court upon the subject.

In Insurance Co. vs. French, 18 How., 404, it is held:

> "Where a foreign corporation is permitted by the statute of another state to do business therein, the latter state has the right to impose, as a condition of the privilege, that it shall be suable by process upon its agent in the state, and a judgment obtained by such service is, under the Constitution and acts of Congress, entitled to the same faith and credit in any other state as it has, by law and usage, in the state where it was rendered."

In this connection counsel refer, with confidence, to the recent case of Forrest vs. Pittsburg Bridge Co., 116 Fed., 357. Service was there made upon a designated agent of the defendant corporation, which thereupon, by special appearance, moved to quash the service, and grounded its motion upon affidavits showing that the defendant company went out of business on the 12th day of May, 1900, since which time it was not engaged in business in Illinois, nor elsewhere, except at Pittsburg, Pennsylvania, where its officers continued to represent it for the purpose of collecting its credits and accounts and settling up its affairs, and that the agent had, in fact ceased to be such for nearly a year previous to the service of summons. The motion was sustained, and, on appeal, the decision of the court was affirmed. It was contended in that case that a foreign corporation, having complied with the act of Illinois, continued to be suable by service made upon a designated representative, when no certificate had been filed setting forth that the person named as agent in the process was no longer a person representing it. This contention was rejected by the Court of Appeals. It may be remarked, with reference to this case, first, that the testimony that the company had ceased to do business or to have an agent in Illinois months before the suit was brought was uncontradicted and unquestioned; second, the action was in form and substance one in personam; third, the defense that the company had ceased to do business before suit brought was made *directly in that proceeding.* We confidently affirm that if, without appearing, a judgment of default had been entered upon the service in that case, the record showing original com-

pliance with the domestic statute, the judgment would have been good in personam against the defendant company, which could not, save in a direct proceeding for that purpose, have assailed it. If, in that action, as in this, the case had been ejectment to recover property judicially sold under the former proceeding, the service would not have been quashed, but the court would have sustained the judgment. The decision is contrary to the opinion of this court in the Phelps case, cited supra. It should be noticed that, with the exception of St. Clair vs. Cox, and Venner vs. Denver Co., practically every authority cited by plaintiff in error, in support of its challenge to the validity of the service of process in the Ouray County Court, presents the question *directly in the original proceeding.* The complaining defendant, by motion, demurrer or petition, preserved the question in the record, and was enabled, by appropriate appellate proceedings, to secure its immediate review. In the two cases specified the judgments were sought to be enforced as judgments in personam, which, under their peculiar circumstances, was not permitted. In neither of them was the service made upon the statutory process agent. We deny the effective force, therefore, of any of these authorities upon the case at bar. Here the defendant in error is in possession of the premises, under a sheriff's deed, based upon judgment and execution on cases brought by attachment, the manner of the service of process in which has never been directly questioned.

It is an established rule that where certain relations and conditions are shown to exist, they are presumed to continue, and hence he who seeks to rely

upon their discontinuance, after their existence has once been established, must, by evidence, establish his contention. This applies to agency, holding office, residence, domicile, settlement, title, position, and the like.

Thus, in McCullough vs. Phœnix Ins. Co., 113 Mo., 606, at page 614:

> "Elkin was, at the time of issuing the policy, the agent of defendant, as shown by the indorsement on it; and as there was no evidence to show to the contrary, and that it was agent's duty to put such indorsement on it when the application was delivered to him, it will be presumed that the duties of his agency were performed. Plaintiff's evidence that Elkin, knowing he was not insured, told him he was insured, and that he would not pay premium till loss occurred, was properly excluded."

The Supreme Tribunal, in Bunney vs. Ry., 111 N. Y., 343; 19 N. E., 71, holds that a person once a master of a vessel will be deemed to continue in that character until displaced by some overt act or declaration of the owners.

Burlington Ins. Co. vs. Thrailkill, 60 Ark., 530; s. c., 31 N. W., 265.

Henkel vs. Welsh, 41 Mich., 664; 3 N. W., 171.

Hensell vs. Maas, 64 Mich., 564; 54 N. W., 381.

Judge Easley says, in Henkel vs. Welsh, supra:

"We think the circuit judge erred, also, in declining to charge that notice of the defects given to the agent or broker, through whom the sale had been made, by the plaintiff was notice to the plaintiff himself. The agency, presumptively at least, continued until the transaction was closed."

[redacted]

The presumption is that the domicile of choice, like the domicile of origin, remains unchanged, and the burden of proof is on the person who alleges a change.

10 Am. and Eng. Ency. of Law, page 14.

But counsel say that the court should not have excluded Exhibit B from the record, and that defendant in error was bound by notice of its contents. That exhibit is a motion filed by the agent of the defendant

company on his own behalf. He was a stranger to the record, and without leave of the court had no authority whatsoever to interpose any motion or affidavit of his own therein. It was no more a part of the record than would have been the affidavit of any other third person to the same purport. The return of the sheriff could be questioned in no such way. The Ouray County Court very justly and properly gave it no attention, and the Circuit Court committed no error in sustaining our objection to its introduction. No authority is needed in support of the proposition that only matters appearing properly thereon can be considered as part of the judicial record, and that all matters extraneous thereto can only become part of the record by a bill of exceptions. The motion was merely interpolated in a bill of exceptions, and it could [illegible] not be successfully contended here that it was [illegible] proper to the transcript.

In Goodnow vs. Litchfield, 114 U. S., 630, the petition for removal alleged that the parties to the suit were citizens of different states, and it was stated generally in the order remanding the case that there was a finding of the court that they were not. That finding was based upon facts brought to the attention of the court in proper form. But the facts bearing upon the question of citizenship did not appear in the bill of exceptions or in an agreed statement of facts, nor in a special finding, nor in any other proper or appropriate mode. It, however, did appear from the record that certain affidavits copied into the transcript had been filed in the case. This court, speaking with reference to this notice, said:

> "The mere fact that a paper is found among the files in a cause does not, of itself, make it a part of the record. If not a part of the pleadings or process in the cause, it must be put into the record by some action of the court. Sargeant vs. State Bank, 12 How., 371, 384; 13 L. Ed., 1028, 1033; Fisher vs. Cockerell, 5 Pet., 248, 254; 8 L. Ed., 114, 116. This must be done by a bill of exceptions, or something which is equivalent. Here, however, that has not been done." * * *

Our rule 8, section 2, requires a copy of any opinion that is filed in a cause to be annexed to and transmitted with the record, on a writ of error or an appeal to this court; but that of itself does not make it a part of the record below.

Jardine takes it upon himself in the motion to say that, because he had not for several years last past, resided in Ouray county he could not be an agent of the defendant company, in accordance with the general laws of the state, and that he had not for years acted as such agent, and did not consider himself or hold himself out to be such, and, therefore, kindly informed the court that he refused to accept service thereunder. Although verified, Mr. Jardine's offer to present questions of law to the consideration of the court was properly determined and disposed of.

We have hitherto considered the objection to the continuation of the agency as affected by change of residence. We may concede, for the sake of argument, that Jardine had not for years "acted as the agent of the defendant company." The statute imposes no duty upon a designated agent which requires

any assertion of activity upon his part. He becomes the agent by virtue of his certificate of appointment. He has no duties whatever to perform. If it becomes necessary or desirable to serve process upon the company the notice served or delivered to him becomes effectual for that purpose. He can not refuse to receive it. His position is entirely passive. It is difficult to conceive of any action from which this agent could abstain whereby his functions under the statute had at any time been terminated. If his appointment carried with it the affirmative exercise of any duty or the pursuit of any line of active conduct, some attention might be given even to his assertion of non-agency. Even then, however, notice of the facts, to be effectual, must be brought home to any third person whose rights would be affected by them. It is not pretended, in the case at bar, that the plaintiffs in the Ouray county cases had any knowledge whatsoever, prior to suit, either of Mr. Jardine's residence in an adjoining county or of his previous failure to act as the company's agent. Of course, his refusal to accept service under the circumstances was ridiculous..

The endorsement upon the back of Exhibit R is peculiar. The paper is labeled as a "Notice to the court that the party purporting to be served was not an agent of the defendant." The defendant itself at no time repudiated Mr. Jardine's agency. The latter did not feel authorized to speak in behalf of the defendant, but only on his own account. An agency can not be repudiated or overthrown in any such manner, and the record as to this formidable document indicates that the court very justly and properly disposed of it.

The record of the Ouray county cases shows the proceedings to have been within the line of every requirement demanded by St. Clair vs. Cox, and kindred cases, as essential to the validity of judgments in personam against foreign corporations. The record discloses in substance the presence of the corporation in the state, its compliance with the requirements of the Constitution and of section 499, its ownership of property, and its transaction of business at the time of suit brought, and service upon its designated agent at a place within the territorial jurisdiction of the court.

The case of Rust vs. United Water Works Co., 70 Fed., 129, involved the construction of section 38 of the Colorado Code, in which His Honor Judge Sanborn, following the case of Goldey vs. Morning News, merely emphasized the general doctrine that,

> "in a personal action against the corporation, brought in a state in which the corporation is not incorporated, in which it does no business, and in which it has no agent, and in which no property is seized, service of summons upon an officer of the corporation temporarily within the jurisdiction is futile."

It is significant that, in the Rust case, the inference is that if the defendant company had appointed a process agent in Colorado, or if any property in the action itself had been seized, service upon such agent, or seizure by legal process of such property, would have given jurisdiction, there being no other jurisdic-

tional defect in the record, but Judge Sanborn held that the suit having been instituted by one foreign corporation against another in the Circuit Court of the United States, such court had no jurisdiction whatever, either of the parties or of the subject-matter. Hence, independent of the question of service, the want of jurisdiction was fundamental.

The case of Sullivan vs. Sullivan Timber Co., 101 Ala., 373; 15 So., 941, where counsel claim the principle governing service of process upon a foreign corporation not doing business within the state to be well settled and fully set forth, supports our contention. Section 4, article XIV, of the Alabama Constitution, provides that no foreign corporation shall do any business in the state without one known place of business and an authorized agent therein, and that such corporation may be sued in any county where it does business. Section 2642 of the Code provides that any corporation may be sued in any county in which it does business by agent. The Alabama case merely holds that unless a foreign corporation is actually doing business in some other county than the one where its office, place of business and authorized agent are designated, it can only be sued in the latter county. We fail to see wherein this decision supports any other than the contention that, if the agent is appointed in one county, a personal judgment can be obtained on suit in that county, and, if doing business elsewhere, it can be proceeded against accordingly. The application of this principle to the case at bar sustains the proposition that The Cosmopolitan Mining Company, having designated Ouray as its place of business, and Jardine as its agent, can be sued in

that county under the Constitution and section 499, Mills' Annotated Statutes, irrespective of any provision of the Code referring to the existence of agents or stockholders elsewhere.

After stating the proposition, with a citation of numerous authorities in support of it, the Alabama court says:

> "If the corporation was not engaged in the transaction of business, or had not property within the state which could be reached by attachment, though its head, or principal, officer may there have had his personal residence, or may have been found there casually, there could not be a valid service of process compelling it to appear.
>
> "A corporation, having fixed for itself a known place of business, and placed therein authorized agents, thereby gives to itself a locality or domicile, and so long as it continues there to do business, may be sued as a domestic corporation may be sued at its domicile or principal place of business. The liability to suit does not now rest upon the theory that the corporation, by sending its agents into the state for the transaction of business, is presumed to consent to be sued here. The assent is expressed in the condition upon which it can legally transact corporate business within the state."

It is only necessary to further observe that this question was, in the case cited, directly presented on

appeal from the judgment of the court below, which was a judgment purely in personam, there being no seizure, directly or indirectly, of any property subject to the process of the trial court.

RETURN SUFFICIENT AS TO JARDINE'S AGENCY.

Counsel complain that the sheriff's return of service upon Jardine in the attachment cases as "the duly authorized agent" of the Cosmopolitan Company fails "to show affirmatively that Jardine was an agent of such character as to authorize service of process upon him," and that defendant may not show that Jardine was the company's authorized agent by any extraneous proof. This contention virtually means that the officer's certificate does not mean what it says, but means just the contrary.

If the Code is to be taken literally, any agent of a foreign corporation may be served with process against it. Indeed, if any agent, great or small, general or special, be within the county of the suit, he must be so served. If section 499, Mills' Annotated Statutes, is a subsisting law, the agent thereunder appointed is designated as "an authorized agent," etc., upon whom process may be served. If, therefore, the officer's return is properly construed, the person served was the duly, i. e., the designated authorized agent of the defendant company.

It may be that a statute permitting service upon any kind of an agent "is inconsistent with universal principles of natural justice;" nevertheless, the states have full authority to so provide as to foreign corporations if they see fit. To hold otherwise is to deny

to them the sovereign right to exclude them altogether, or to admit them subject to any conditions their legislatures shall see fit to prescribe. The principle, however, is purely one of abstract interest here, since the record discloses service upon the individual deliberately selected and certified on the records of the secretary of state as the one on whom all process against the company "may be served." Hence, it seems hardly worth while to review the authorities collated by counsel on the general proposition further than to show that they have no application to any case that could arise under the provisions of the Colorado statutes.

In Stone vs. Travelers Ins. Company the return showed service on defendant by delivery of copy to the "state agent." It was held that the description referred to the agent appointed under the statute, and described him with sufficient definiteness. To same effect is Eagle Life Ins. Co. vs. Redden, 25 So. (Ala.), 779, supra.

In Farrell vs. Oregon Gold Mining Co. (Oregon), 49 Pac., 876, a *personal* judgment by default was sustained against a foreign corporation, although the return of service did not show that it was doing business in the state when service was made. That fact could be shown in any other part of the record.

See

J. L. Mott Co. vs. West. Coast Co., 113 Cal., 341; 45 Pac., 683.

Frick Company vs. Wright (Tex.), 55 S. W., 608, holds that, under a statute similar to ours, service on "E. F. T., agent of F. Co.," amended by order of court

to read "C. F. F., local agent of F. Co.," was sufficient service. This case also holds that, "where the record shows that defendant is a foreign corporation, and it is alleged that the corporation has a local agent in the state, and the court finds such allegation true, and that he has been duly served with process, the service of the citation is valid, although the record does not state, in direct terms, that the corporation is doing business in the state."

In Kiufeke vs. M. D. T. Co., 11 Fed., 282, the return wholly failed to comply with the requirement of the Missouri statute, requiring service "on an agent in charge of an office or place of business of defendant * * * having an office or doing business in the state." On motion of defendant, the service was quashed.

A. B. L. Assn. vs. Hallum, 59 Ark., 583, was an appeal from a motion to set aside a default on alleged defective service. The appeal was sustained, because the service did not comply with the statute requiring service on the agent designated for that purpose by the company. The service of a summons in that state must be in the county where suit is brought, and it was made in another county. We have seen that no such limitation applies to the process of the Colorado courts. Besides, the return here involved expressly recites service on the duly authorized agent, that is the designated agent of the company.

I. M. T. Co. vs. Kennedy, 24 Ill., 319, and C. P. M. Co. vs. Bank, 86 Ill., 587, were also appeals from orders denying motions to set aside defaults entered on defective service. In each instance the service on the officer "as president" or "as secretary" was held

not to be a return of service on the president or on the secretary, and, therefore, not a compliance with the positive mandate of the statute.

U. P. Co. vs. Pillsbury, 29 Kan., 652, and Dickerson vs. B. & M. Co., 43 Kan., 702, presented the question in the same way, and the same conclusions for the same reasons were announced. The kind of agent on whom service was made was not there recited. Here the return expressly informs the court who the agent was.

Kirby Carpenter Co. vs. Twombly, 101 Mich., 447; 59 N. W., 809, was an appeal from proceedings aimed at defective service. Section 7086 of the Michigan statute, authorizing summons of garnishment upon foreign corporations to be served by leaving a copy with any officer, member, clerk or agent within the state, was held to apply only to garnishment proceedings in which the original suit was instituted by attachment, and that under section 8055, requiring summons of garnishment against a corporation to be served on the president, cashier, secretary, treasurer, general or special agent, or other principal officer, a return, showing service upon "A., the agent of said defendant, having charge of its affairs within said county," was insufficient to confer jurisdiction. This decision was based on Railway Co. vs. Hunt, 39 Mich., 469, which defined the terms "general or special agent" to mean agents who, either generally or in respect to some particular business, have a general or special controlling authority.

Toledo Ice Co. vs. Munger, 82 N. W., 663, involved service on a domestic corporation in a case brought before a justice of the peace. Service was

held bad because not made on agent in charge of the business office designated by the corporation and certified to the secretary of state. Its pertinency to the case at bar is not apparent.

Haley vs. St. J. Ry. Co., 80 Mo., 112, was garnishment from a justice's court. The statute concerning service required it to be made on the "nearest station or freight agent" of the railroad company. The return specified the nearest agent only, and it was therefore quashed

These decisions were the result of direct proceedings. All of them involved the construction of statutes, and of returns different in all essential respects from those at bar. We might present additional counter authorities bearing on the general subject, but the decision of this court in Henrietta Company vs. Johnson seems conclusive upon the subject, and should be decisive here, even were this a direct instead of a collateral attack upon the sheriff's return.

Mr. Jardine had been "duly authorized" or appointed to receive service for the company. The expression could refer to no other than its designated statutory process agent.

Counsel's authorities relating to the form of sheriff's returns of process are those in which the return was directly attacked, or in which amendments were sought to be made to them as affecting domestic judgments. It is hardly necessary to add that they do not affect this controversy.

PROOF OF JARDINE'S AGENCY OUTSIDE THE JUDGMENT RECORD.

Counsel also attack the ruling of the Circuit Court, whereby copies of the resolutions appointing Jardine as agent for service of process, and duly certified under the hand and seal of the secretary of state, and of the county clerk and recorder of Ouray county, were admitted in evidence.

This objection is hardly consistent with the averments of plaintiff's replication that "no summons or other process, writ of attachment or other writ, was served on any agent of the plaintiff or served in any other way upon the plaintiff." (Transcript, pages 8, 10, 11, 12.) If the court was wrong in excluding testimony as to Jardine's agency because "the agency was a jurisdictional fact and can not be proved outside of the record itself," it was certainly right in excluding plaintiff's offer of testimony tending to show non-agency, save as to Jardine and the existence of his office in Ouray, hereafter referred to. But the court was right in each instance; the first, because the testimony offered did not disprove an agency, and the second, because service on the agent was an express issue in the case, and made so by the plaintiff's replication, and because, the jurisdiction of the County Court as to plaintiff's person being challenged, defendant had the right to support it by proof *dehors* the record. Besides, the proof, although in no manner contradicting the record, is admissible if counsel's contention be correct, that the judgment as to the federal courts is a foreign one. Mr. Black cites Thompson vs. Whitman, 18 Wall., 45, and many other authorities in sup-

part of the view that as to the record of foreign judgments the jurisdictional recitals of the record may be inquired into. (2 Black on Judgments, section 901, and cases collated.) Indeed, the recognition of this doctrine is essential to a consideration of the plaintiff's case; for if it be not true, its errors assigned, however meritorious, can avail nothing. And if evidence may be offered to overthrow such a judgment, it is clear that evidence to support it is equally pertinent.

The evidence offered by defendant in no manner contradicted the record of the judgments. It merely identified Jardine as the company's authorized process agent, by exhibiting his certificate of appointment, accompanied by the fact that it had never been revoked. This proof was perhaps unnecessary, if counsel's objection to it be well founded. The result would be, however, that the recitals of the record, being proof against assault or explanation, conclusively establish the regular service of process and the regularity of the ensuing judgments, executions and sales.

The cases cited by counsel in support of objections to the introduction of the certificates relate to records of domestic judgments, concerning which the rule seems to be fairly well settled, that their jurisdictional averments are conclusive. (1 Black on Judgments, 271.) Some authorities have extended the rule to foreign judgments as well, but they are opposed to the general current of the decisions. *And where the defendant in a foreign judgment traverses the fact of jurisdiction of his person*, the plaintiff

may introduce extraneous evidence to show the jurisdiction in fact attached.

Knowles vs. Logansport Co., 19 Wall., 58.

American Co. vs. Crafts, 156 Mass., 501; 30 N. E., 124.

Sears vs. Dacey, 122 Mass., 388.

2 Black on Judgments, 899.

THE JUDGMENTS VALID IN REM, AND EXEMPT FROM ATTACK, COLLATERAL OR OTHERWISE.

We have hitherto endeavored to sustain the judgment in the attachment suits, considered as judgments in personam, against the attacks of the plaintiff in error. If we have succeeded, there is an end to plaintiff's contention, and the judgment of the court below must be approved.

On the other hand, the defendant in error is not compelled to rely upon that position. The record of the judgments might disclose defects subjecting them to successful assault by the plaintiff in error in proceedings in personam against it founded upon them, and yet be impregnable to such assaults when considered as judgments in rem.

The proceedings were by attachment, and the property in controversy was levied upon, and the levies duly recorded. The judgments were for the sums mentioned, both in the complaints and the attachment writs. Special executions were issued under the judgments against the attached property, and upon the sale thereof a sufficient amount was realized to fully cancel the judgments and the costs of

the proceeding. No instance remaining they were completely extinguished, thereby making any effort to enforce them as judgments in personam both unnecessary and impossible. Section 91, Mills' Annotated Code, provides:

> "The plaintiff, at the time of issuing the summons or filing the complaint in an action on contract, express or implied, or at any time afterward before judgment, may have the property of the defendant, exempt from execution, attached as security for any judgment that may be recovered in such action in the manner prescribed in this chapter, unless the defendant shall give good and sufficient security to secur the payment of such judgment."

Section 92 declares that:

> "No writ of attachment shall issue unless the plaintiff, his agent or attorney, or some credible person for him, shall file in the office of the clerk of the court in which the action is brought, an affidavit setting forth that the defendant is indebted to such plaintiff, stating the nature and amount of such indebtedness as near as may be, and alleging any one or more of the following causes for attachment,"

Among which are:

> "Second—That the defendant is a foreign corporation."

"Tenth—That the defendant has failed or refused to pay the price or value of any article or thing delivered to him, which he should have paid for upon the delivery thereof."

"Eleventh—That the defendant has failed or refused to pay the price or value of any work or labor done or performed, or for any services rendered by the plaintiff at the instance of the defendant, and which should have been paid at the completion of such work, or when such services were fully rendered."

Section 92-c provides that:

"The final judgment in such action shall be a several judgment, wherein each creditor named as plaintiff shall have and recover of the defendant the amount of his claim or demand, as found to be due, together with his costs," etc.

Section 93 directs the sheriff

"to attach the lands, tenements, goods, chattels, rights, credits, moneys and effects of said debtor, of every kind, or so much thereof as will be sufficient to satisfy the claim sworn to, with interest and costs."

Section 97 provides for writs to different counties, and also provides that

"several writs may be issued at the same time to sheriffs of different counties."

Section 104 specifies the manner of levy:

"First. Real property standing upon the records of the county in the name of the defendant, shall be attached by filing a copy of the writ, together with a description of the property attached, with the recorder of the county."

Section 105 requires the recorder

"to record the levy in a book to be kept for that purpose, and to index the same in the records."

Section 109 reads as follows:

"If after selling all the property attached by him remaining in his hands, and applying the proceeds, together with the proceeds of any debts or credits collected by him, deducting his fees, to the payment of the judgment, and any balance shall remain due, the sheriff shall, if there be a general, personal judgment against the defendant, proceed to collect such balance as upon an execution in other cases. Whenever the judgment shall have been paid, the sheriff, upon reasonable demand, shall deliver over to the defendant the attached property remaining in his hands, and any proceeds of the property attached unapplied on the judgment."

The record of the Ouray county cases shows a literal compliance with all the requirements of the at-

tachment law, and the County Court of Ouray county having, by virtue of its attachments, acquired jurisdiction of the property of the plaintiff in error, its subsequent proceedings were not void. Counsel for plaintiff in error have searched in vain for decisions to the contrary. Those which have been cited, almost without exception, apply to judgments in personam. Judgments in rem, or quasi in rem, rendered by a court having jurisdiction in itself, may in individual instances be voidable, but they are not void, and, therefore, can not be subject to collateral attack.

In the recent work of Clark & Marshall on Private Corporations, volume 3, section 861, it is said:

> "If a corporation has real or personal property in another state or country than that in which it is created, it may be proceeded against in such other state by attachment of the property, as in the case of any other non-resident, for the proceeding is in rem, and it is not necessary that the court shall acquire jurisdiction of the corporation."

Citing:

> Blackstone Mfg. Co. vs. Inhabitants of Blackstone, 13 Gray, 488, and a large number of other cases.

"Jurisdiction," says Van Fleet, "is simply power." The Supreme Court of the United States has defined it to be "the power to hear and deter-

mine," and afterwards, "to hear and determine, and give the judgment rendered."

U. S. vs. Arredondo, 6 Peters, 691, 710.
Ex parte Reed, 100 U. S., 13.

The levy having been properly made, the subsequent action of the court, whether regular or not, can not be collaterally assailed.

THE ATTACHMENT LIEN.

Counsel contend that, under Colorado statutes, the courts do not obtain jurisdiction by levy on property in attachment, unless a copy of the writ is also served upon the defendant. If this is true, the result is that no judgment *in rem* can be rendered in Colorado in attachment proceedings, since the service of the writ must convert the proceedings into one *in personam*. The statement of the result demonstrates the unsoundness of the proposition.

In Van Wagenen vs. Carpenter, 27 Colo., 444, the writ of attachment was levied by recording the same, in accordance with the statute. In addition thereto, the sheriff certified that "none of the within defendants were found within my county." At the time, the interest belonging to Gill, and which was covered by the attachment, stood on the records in the name of Anna Van Wagenen. Section 104 of the Code provides *inter alia* that:

> "Second: Real property, or any interest therein, belonging to the defendant and held by any person, or standing upon the rec-

ords of the county in the name of any other person, but belonging to the defendant, shall be attached by leaving with such person, or his agent, a copy of the writ, and a notice that such real property, giving a description thereof, and any interest therein belonging to the defendant, are attached pursuant to such writ, and filing a copy of such writ and notice with the recorder of the county."

This was not done. The case was afterwards dismissed as to all the defendants, except Gill, who was afterwards served by publication, and judgment entered against him. The judgment was collaterally assailed as being null and void, because it did not affirmatively appear on the return of the sheriff that the Code provision above quoted had been observed. The court held the judgment thus rendered to be proof against such attack.

The same section of the Code provides that:

"Real property, standing upon the records of the county in the name of the defendant, shall be attached by filing a copy of the writ, together with a description of the property attached, with the recorder of the county."

This having been done, the lien was consummated, and the jurisdiction of the court over the property was complete.

To constitute a valid levy upon land the officer must do some act to show that he has seized the prop-

ercy and exercised dominion over it, and that is sufficient to put the tenant upon notice.

It is not necessary that the officer, in levying upon land, should take possession of the same, enter upon it, or even have the same in his view.

Lessee of Cochrane vs. Loring, 17 O., 409.
Wood vs. Weir, 5 B. Mon. (Ky.), 544.
Miller vs. Sims, 3 Tex. Civ. App., 65.
Walton vs. Hope, 3 Tex. Civ. App., 499.
Campau vs. Barnard, 25 Mich., 381.
Schoonover vs. Osborne, 111 Iowa, 140; 82 N. W., 505; 82 Am. St. Rep., 496.
Craig vs. Fraser, 73 Ga., 246.
Hardin vs. Lee, 51 Mo., 241.
Freeman vs. Thompson, 53 Mo., 183.
Kane vs. McCown, 55 Mo., 181, 200.
Johnson vs. Gage, 57 Mo., 160.
Lessee of Paine vs. Moreland, 15 O., 435; 45 Am. Dec., 585.

Section 97 of the Code provides that several writs may be issued at the same time to the sheriffs of the different counties. Nothing in that or any other section requires a copy of the writ to be served upon the defendant in the county where the property is attached, or in the county where the suit is brought. On the contrary, by section 97, the writ shall be directed to the sheriff of *any* county in which the property of the defendants may be. The writs of attachment personally served on Jardine, as plaintiff's agent, were directed to and served by the sheriff of San Miguel county. Even, therefore, had counsel correctly stated

the law, the facts are against them, for the service was made upon the company's agent by the writs of attachment, properly directed to the sheriff of the county making the same, and nothing in the statute, direct or by implication, requires the service of a writ to be within the limits of any particular county. Having complied with what plaintiff in error claims to be the essential requirements of the law, the resulting jurisdiction of the court over the property must be conceded.

The great case of Cooper & Reynolds, 10 Wall., 308, though frequently distinguished, has always been approved by the federal and most of the state courts whenever the question has been directly presented. It was there determined, in harmony with the preceding case of Voorhees vs. Jackson et al., 10 Peters, 449, that no judgment can be void or disregarded in a collateral attack on any other ground than the one of the jurisdiction of the court which rendered it.

> "It is of no avail," said Justice Miller, "to say that there are errors in the record, unless they be such as to prove that the court had no jurisdiction in the case, or that the judgment rendered was beyond its power. This principle has been often held by this court, and by all courts, and it takes rank as an axiom of the law."

The learned justice then defined jurisdiction over the subject-matter to be

> "the nature of the cause of action and of the relief sought; and this is conferred by

the sovereign authority which organizes the court, and is to be sought for in the general nature of its powers, or in the authority specially conferred.

"Jurisdiction of the person is obtained by the service of process, or by the voluntary appearance of the party in the progress of the cause.

"Jurisdiction of the res is obtained by a seizure under process of the court, whereby it is held to abide such order as the court may make concerning it."

Jurisdiction of the latter class is expressly made to include the levy of a writ of attachment for the seizure of real estate lying within the territorial jurisdiction of the court. The facts of that case are too familiar to justify extended consideration. Suffice it to say that the only pretense of notice there given to the defendant was a most lame and ineffectual effort to comply with the statutory requirements of service by publication. In a direct proceeding upon the judgment it would probably have been reversed. This court justly held that when a writ has been issued and the property seized, and that property condemned and sold, it can not be urged that the court had no jurisdiction for want of sufficient publication of notice.

Needham vs. Wilson, 47 Fed., 97, was a bill inter alia to set aside two judgments obtained in the District Court of Colorado in attachment against the property of the Great West Mining Company. The bill, among other things, recited that the Supreme

Court of Colorado had determined the said judgments to be absolute nullities, but had refused to vacate them because the company had been guilty of laches in applying therefor. The court said:

> "If it were stated that the Supreme Court had reached the conclusion that the judgments were void, and had declared them to be void, and had set them aside upon that ground, we should still be compelled in this court to adhere to the doctrine first announced in the case, and which is found in Cooper vs. Reynolds.
>
> "The principle declared in Cooper vs. Reynolds is of general jurisprudence, affecting all actions in federal courts, and not at all controlled by any decision that may be made in any court of any state. But the Supreme Court of the state has not so declared."

The case of Purdy vs. Wallace-Muller Co., Ltd., 81 Federal, 515, was brought in a Massachusetts state court by process of foreign attachment without personal service. The case was then removed on the statutory appearance to the Circuit Court, and a motion interposed to dismiss, based on Goldey vs. Morning News, 156 U. S., 518. The motion was denied, and the case distinguished from that of Goldey. The court said:

> "After seizure of the property, the case may, at the election of the defendant, assume either of two forms, that of a proceeding in which only the res is involved, or that

of a personal action between individuals. It is by treating it as the latter that the defendant comes within the provisions of the statute of removals, and introduces the necessary element of diverse citizenship. If the defendant does not appear and is not served, as was said in Cooper vs. Reynolds, 10 Wall., 308, 312, the case becomes in its essential nature a proceeding in rem. If it is to be so regarded after removal, then should not the case be remanded, as not within the provisions of the statute authorizing the removal of suits between citizens of different states? If, on the other hand, the defendant treats it as a personal action, it becomes so, not by virtue of the service of process, but by virtue of its own act in electing to treat a proceeding in rem or quasi in rem, requiring no personal service within the jurisdiction, as a personal action. But, in whatever light these questions may be regarded, I am satisfied that the proper alternative is not to retain jurisdiction or to dismiss, but to retain jurisdiction or to remand."

In Ludlow vs. Ramsey, 11 Wallace, 587, this court, approving Cooper vs. Reynolds, said:

"The writ of attachment appears to be in due form, and to have been regularly served on the property; so that the court became fully possessed of jurisdiction over the case."

In White vs. Crow, 110 U. S., 183, the agent of the absent defendant appeared and consented to entry of judgment before the time for filing answer had expired. The court, approving Cooper vs. Reynolds and Cornett vs. Williams, 20 Wallace, 226, sustains the judgment, declaring that it could not be successfully attacked in a collateral way, even by the defendant, but the judgment must be assumed to be valid and binding until reversed in a direct proceeding.

In Hadley vs. Donoghue, 116 U. S., 3, this court, citing Maxwell vs. Stewart, 22 Wall., 77; Ins. Co. vs. Harris, 97 U. S., 331, and Green vs. Buskirk, 7 Wall., 139, and Cooper vs. Reynolds, declared that

> "by the settled construction of these provisions of the Constitution and statutes of the United States the judgment of a state court, in a case within its jurisdiction and against a defendant, lawfully summoned, or against lawfully attached property of an absent defendant, is entitled to as much force and effect against the person summoned or the property attached when the question is presented for decision in the court of another state as it is in the state in which it was rendered."

Field vs. Dortsch, 34 Ark., 399, was like this, an action in ejectment. The defendant claimed title under sheriff's deeds issued upon execution sale in suits by attachment against the plaintiffs. The writ was executed and returned "not found as to the de-

fendant." The notice of publication, signed by the sheriff, complied not at all with the law, and was followed by a judgment in default. Certain orders of sale thereafter made recited the appearance of the defendant by her attorney. The court declared it to have been a gross error in the Circuit Court to render judgment by default under the circumstances, but as it then had actual jurisdiction of the property attached, and as the intrinsic power of the court over the property originated with and related back to the levy, it could not be collaterally questioned.

In Hunter vs. Ruff, 47 S. C., 425; 58 Am. St. Rep., 529, and 25 S. E., 75, the judgment was on attachment and constructive service. It was held that a defendant who seeks to assail a judgment against him while he was a non-resident can not divest rights of interested persons which have vested before any assault has been made upon the judgment which, upon its face, was entirely regular and free from infirmity at the time the purchase was made.

In Hardin vs. Lee, 51 Mo., 241, an erroneous judgment and execution was held not to be void, or the subject of collateral attack, where jurisdiction was acquired of the property which was the subject of the action, or attachment, under a writ properly issued.

Massey vs. Scott, 49 Mo., 282.

Kane vs. McCown, 55 Mo., 201.

Bell vs. Gaylord, 6 N. M., 229; 27 Pac., 494.

Lovejoy vs. Albee, 33 Maine, 414; 54 Am. Dec., 630.

Molineux vs. Seymour, 30 Ga., 440; 76 Am. Dec., 662.

Dupont vs. Abel, 81 Fed., 534.

Bank vs. Clement, 109 Ala., 270; 19 So., 814.

Miller vs. White, 33 S. E., 333.

Freeman vs. Thompson, 53 Mo., 195.

Head vs. Daniels, 38 Kan., 13; 15 Pac., 917.

Loughbridge vs. Bowland, 52 Miss., 560.

Barrelli vs. Wagner, 5 Tex. Civ. App., 449; 27 S. W., 18.

Hall vs. Hall, 12 W. Va., 13.

Craig vs. Fraser, 73 Ga., 246.

Lessee of Paine vs. Moreland, 15 O., 435; 45 Am. Dec., 585.

McDonald vs. Simcox, 98 Pa. St., 619.

Mudge vs. Steinhart, 78 Cal., 134; 20 Pac., 147.

McAllister vs. Guggenheimer, 91 Va., 317; 21 S. E., 475.

The case of Darnell vs. Mack, 46 Neb., 740; 65 N. W., 805, is a most important one in that it overrules the former decisions of that court, and following Cooper vs. Reynolds, decides that where property has been seized under writ of attachment regularly issued and levied the court acquires jurisdiction over the property, so far as to render the custody of its officers lawful, and jurisdiction to that extent is not lost so long as the action remains pending by failure to serve process in the main action upon the defendant. A judgment rendered under such circumstances is proof against collateral attack. This case is valuable, also, as exposing the unreliability of Wade's conclusions

and the falsity of his quotations from and comments upon Cooper vs. Reynolds.

The Supreme Court of Colorado, in the case of Brown vs. Tucker, 7 Colo., 30, recognized and approved the doctrine of Cooper vs. Reynolds. In that case an attempted service was had by publication, pending which and before its maturity, the judgment was entered and the attached property sold. The judgment was sustained in a decision clearly defining the distinction between Pennoyer vs. Neff, 95 U. S., 714, and Cooper vs. Reynolds. Of the Pennoyer case the court said:

> "It was the case of a purely personal action against a non-resident of the state, not in any manner partaking of the nature of an action in rem, the recovery of a personal judgment upon constructive service of process, and the subsequent attempt to subject property to the satisfaction of the judgment. The ruling of the Supreme Court is that it is essential to the jurisdiction of a state court, in such a case, that the debtor have property within the state that can be applied in satisfaction of his indebtedness. Otherwise the judgment is void."

> "The precise point as to the validity of this writ of attachment was under consideration in this court in the case of Cooper vs. Reynolds, 10 Wall., 308, in which the effect of an insufficient affidavit for a writ of attachment was set up to defeat the title to land acquired by a sale under the attach-

ment. The case has often been quoted since, and is conclusive in the federal courts in regard to the validity of their own processes when collaterally assailed."

Matthews vs. Densmore, 109 U. S., 219.

Mr. Justice Matthews, in Heidritter vs. Oil Cloth Co., 112 U. S., 301, quoting Cooper vs. Reynolds, said:

"The kind of process and mode of service could be material only with reference to the nature of the judgment. He could be personally bound only by his coming or being brought personally within the jurisdiction of the court. But the land might be bound without actual service of process upon the owner in cases where the only object of the proceeding was to enforce a claim against it specifically, of a nature to bind the title. In such cases the land itself must be drawn within the jurisdiction of the court by some assertion of its control and power over it. This, as we have seen, is ordinarily done by actual seizure, but may be done by the mere bringing of the suit in which the claim is sought to be enforced, which may, by law, be equivalent to a seizure, being the open and public exercise of dominion over it for the purposes of suit."

The subject has received exhaustive and satisfactory consideration in Bank vs. Richardson, 34 Ore.,

518; 75 Am. St. Rep., 664; 54 Pac., 362, and the principle recognized and enforced in

Oil Mill Supply Co. vs. Noel, 64 O. St., 430; 60 N. E., 604.

Morrill vs. Morrill, 20 Ore., 96; copious note to same; 23 Am. St. Rep., 115.

Wilson vs. R. W. Co., 108 Mo., 588; 32 Am. St. Rep., 624.

Hartzell vs. Vijen, 66 Am. St., 601; 35 L. R. A., 451; 6 N. Dak., 117.

Newfelder vs. Ins. Co., 6 Wash., 336; 36 Am. St., 166.

Hardy vs. Beatty, 84 Tex., 562; 31 Am. St. Rep., 80.

Cuzen vs. Stephens, 123 Mo., 337; 45 Am. St. Rep., 549.

Stevens vs. Reynolds, 143 Ind., 467; 52 Am. St. Rep., 80

Miller vs. White, 46 W. Va., 67; 33 S. E., 332; 76 Am. St. Rep., 791.

McIntosh vs. Augusta Oil Co., 35 S. E. (W. Va.), 860.

In Brown vs. Campbell, 100 Cal., 635, an attachment on any surplus there might be of the proceeds of a trustee sale, without personal service, followed by judgment, was sustained against collateral attack in an exhaustive opinion.

Authorities might be further cited that jurisdiction of the res is acquired in an action at law on a contract by the service and levy of a writ of attachment thereon, and that a judgment subsequently rendered is as to such property, regardless of the character or

defect of personal service, assailable only in a direct proceeding instituted for that purpose, but it is deemed unnecessary. It remains, nevertheless, to consider some of the arguments of counsel in opposition thereto, and some of the authorities relied on to support them. Counsel assume that no service whatever was made in the proceedings, the validity of which they assail, and that the mere service and levy of the writ of attachment can not avail in the absence of personal service, actual or constructive, upon the defendant. This is virtually to assert that no distinction exists between judgments in rem and in personam. We have heretofore endeavored to refute the assertion, and maintain that service was made. We deny, however, that as to the property attached the judgment is void, even in the absence of service, and, while there are authorities to the contrary, they can not prevail in this jurisdiction, where, as stated by Judge Hallett, in Needham vs. Wilson, supra, "the principle here declared is one of general jurisprudence."

Counsel place great stress upon Great Western M. Co. vs. Woodmas M. Co., 12 Colo., 46. The judgments there concerned were the identical ones which Needham vs. Wilson was intended to affect by direct attack. It is in that opinion expressly declared that a judgment in attachment, without complete service, actual or constructive, upon the debtor, is void, and the judgment was reversed for that reason; but in the same case, in 14th Colo., page 90, the Supreme Court of Colorado, in effect, reversed this decision, and expressly declared that "the judgment of a court of general jurisdiction is not void unless it appears from the record itself that the court, in pronouncing it, acted without jurisdic-

tion. A judgment rendered without bringing the defendants into court is not for this reason void, but voidable only, unless the failure to obtain jurisdiction over them appears from the record."

The case of Thompson vs. White, 25 Colo., 226, cited by counsel, was a direct proceeding in attachment. In that case the writ had been levied and recorded, but no copy delivered to the defendant, who shortly afterwards died. Personal service was then attempted upon the executor, which the court refused to sustain. The point stated by the court is that "no jurisdiction to order a sale of the propertyexists until a levy of the attachment is made, which consists of delivering a copy, together with a description of the property sought to be attached, to the recorder, and until the writ is served by delivering a copy to the defendant, if he is a resident, or the equivalent of such service, if such be the effect of a general appearance." It will be noticed, first, that, as in Reynolds vs. Ray, 12 Colo., 108, the principle announced applies only to attachments against the property of resident debtors; and, second, that the question did not arise collaterally. An equally cogent reason for setting aside the judgment is found in the fact that it was based on service upon the executrix, and after the death of the defendant.

The case of Van Wagenen vs. Carpenter, supra, disposes of the point:

> "When an action of a court of general jurisdiction is invoked in attachment proceedings, although its power to act is conferred by a special statute, it, nevertheless, in

exercising such special powers, acts judicially, and is none the less a court of general jurisdiction, because it proceeds according to rules and practice prescribed by the statute. The same consideration of public policy and reasons exist why the record, if silent, should be aided by the same presumptions which obtain in cases of personal service. Whether a writ of attachment is issued as an auxiliary to the main action, or to initiate jurisdiction against a non-resident, to constitute a valid levy of the writ the acts required by the statute must be done, which are the same in both instances, and the purpose to be accomplished the same, to wit, to bring the property under the dominion of the court for the purpose of subjecting it to the satisfaction of any judgment that may be obtained. The rule requiring the seizure of property within the state belonging to a non-resident defendant, as a condition precedent to the exercise of jurisdiction, is a judicial and not a statutory requirement."

The court then says that this conclusion does not militate against Thompson vs. White, supra, "but only recognizes, as applicable to judgments in this class of cases, *the same presumption of jurisdiction upon collateral attack* that obtains in other cases, to wit, that everything necessary to be done was done, unless the contrary appears from the record."

This case was based on the fact that within the limit of two thousand dollars as to amount, the jurisdiction of the County Court of Colorado is general,

and its writs entitled to the same force as those of the District Court in similar cases. Such is the course of our own decisions.

Fletcher vs. Stowell, 17 Colo., supra.
Cody vs. Raymond, 1 Colo., 277.
Hughes vs. McCoy, 11 Colo., 597.
Grignous Heirs vs. Astor, 2 How., 320.
Foster vs. Givens, 67 Fed., 688.
Huxley vs. Harold, 62 Mo., 523.
Tilton vs. Cofield, 93 U. S., 165.
Borden vs. State, 11 Ark., 552.
Howard vs. State, 47 Ark., 441; 2 S. W., 103.
Beauregard vs. New Orleans, 22 How., 14.

We deny the intimation of counsel that Cooper vs. Reynolds has been overruled or limited by the case of Guarantee Trust Co. vs. Green Cove R. R. Co., 139 U. S., 137. As stated by the court in Hunter vs. Ruff, supra:

> "The comments of Justice Brown in the subsequent case can not affect the former, because it was distinguished from the latter by the fact that in Cooper vs. Reynolds the property in question was seized under a writ of attachment on proceeding in rem, while in the latter case there was no attachment."

Indeed, his Honor, Mr. Justice Brown, so carefully distinguished the principle of Cooper vs. Reynolds from the one there involved that it is difficult

to understand how by any system of reasoning a conflict between the two is discernible.

We have examined every case in the reports of this court which in any manner refers to Cooper vs. Reynolds, and no authority has ever been more consistently maintained and enforced.

In Roller vs. Holly, 176 U. S., 405, the court says:

> "The cases in which it has been held that a seizure, or its equivalent, an attachment or execution upon the property, is necessary to give jurisdiction, are those where a general creditor seeks to establish and foreclose a lien thereby acquired. Of this class Cooper vs. Reynolds, 10 Wall., 308, is the most prominent example."

In Chicago R. R. Co. vs. Strum, 174 U. S., 716, Mr. Justice McKenna said:

> "The idea of locality of things which may be said to be intangible is somewhat confusing, but if it be kept up the right of the creditor and the obligation of the debtor can not have the same, unless debtor and creditor live in the same place. But we do not think it necessary to resort to the idea at all, or to give it important distinction. The essential service of foreign attachment laws is to reach and arrest the payment of what is due and might be paid to a non-resident to the defeat of his creditors. To do it he must go to the domicile of his debtor, and can do it

> only under the laws and procedure in force there. This is a legal necessity, and considerations of situs are somewhat artificial. If not artificial, whatever of substance there is must be with the debtor. He, and only he, has something in his hands. That something is the res, and gives character to the action as one in the nature of a proceeding in rem."

There is no conflict whatever between the line of cases of which Pennoyer vs. Neff, 95 U. S., 714, and St. Clair vs. Cox, 106 U. S., 350, are leading ones, and those we are now considering. In one the judgments were voided as judgments in personam, there being neither personal service nor seizure of property; in the other they were sustained as judgments in rem, in so far as the property seized was affected by them. Thus, in St. Clair vs. Cox, the court says:

> "In Pennoyer vs. Neff we had occasion to consider at length the manner in which state courts can acquire jurisdiction to render *a personal judgment* against non-residents which would be received as evidence in the federal courts; and we held that personal service of citation on the party or his voluntary appearance was, with some exceptions, essential to the jurisdiction of the court."

It is then said that the

> "doctrine of that case applies, in all its force, *to personal judgments* of state courts against foreign corporations."

This distinction has always been recognized by this court. It is manifest wherever the occasion for noticing it has arisen. Thus *Mr. Justice Peckham*, in Insurance Co. vs. Spratley, said:

> "In a suit where no property of a corporation is within the state, and the judgment sought is a personal one, it is a material inquiry to ascertain whether the foreign corporation is doing business within the state, and if so, the service of process must be upon some agent so far representing the corporation in the state that he may properly be held in law an agent to receive such process in behalf of the corporation."

This expressly supports our contention that where the jurisdiction is acquired by attachment over the property of a non-resident corporation, the element of its doing business therein is not essential.

In Fitzgerald Co. vs. Fitzgerald, 137 U. S., 98, it is decided that where jurisdiction has been obtained by service of garnishee process in a proceeding in rem, the court has power to proceed, notwithstanding defect in service on the person. In such case, objection to jurisdiction over the person, to be availing, must not be raised in connection with denial of jurisdiction over the subject-matter. The defendant below having denied the power of the court to proceed at all, and upon decision against it having joined issue and gone to trial on the merits, as jurisdiction existed over the subject matter, it was properly maintained over the person, even though such service

might have been set aside. St. Clair vs. Cox is cited and distinguished.

In view of the unequivocal determination of the question by the authorities above quoted, and of the clear distinction between judgments in rem and judgments in personam, as affected by the service of process, it seems unnecessary to burden the court with an extended review of the many cases cited by counsel in support of their general proposition that judgments in personam, to be valid, must have been rendered after acquiring jurisdiction of the person. They are not applicable to conditions presented by this record, and can serve no other purpose than to demonstrate the extreme industry of counsel.

In the case of Windsor vs. McVeigh, 92 U. S., 274, a different principle is involved. The property of the plaintiff in that case had been confiscated as an act of war, by order of the district attorney, in July, 1863, acting under instructions from the attorney general. A libel in the name of the United States was filed against the property by a process of monition published and posted. It was justly held that a proceeding in rem as an act of war or condemnation for alleged forfeiture, without notice and opportunity to be heard, was an absolute nullity, under which no title to the property could be founded. The decision of this court in that case never has been and never can be questioned. Its essential differences to the case at bar are readily apparent, in that the creditors of the plaintiff in error have here, under the provisions of a statute enacted and universally applicable for the purpose, subjected property within the jurisdiction to the payment of their just claims, and have

made service upon the properly constituted representative of the defendant. Neither an act of war, of confiscation, nor of forfeiture is involved. The proceeding is not only special and provided for immediate emergency, but applicable generally to similar conditions everywhere. It is indeed a significant circumstance that no reference is made in the court's opinion to Cooper vs. Reynolds as in any manner affecting or bearing upon the facts. See

Loaiza vs. Superior Court, 85 Cal., 34; 20 Am. St. Rep., 210.

Milburn vs. Smith, 11 Tex. Civ. App., 682; 33 S. W., 911.

Ex parte Reed, 100 U. S., 23.

The Fred M. Lawrence, 94 Fed., 1017.

Counsel have cited a long list of authorities, beginning with Judge Cooley, in support of the general proposition that neither actual manual seizure of personalty, nor "actual manual occupation" of real property, to say nothing of a mere levy of attachment, is sufficient to give a court jurisdiction to enter a judgment in rem or quasi in rem, without reasonable notice to the defendant. The great bulk of the authorities cited were those in which such adjudication without personal service, or with defective personal service, were sought to be enforced as judgments in personam, or in which the character of service was directly attacked in the particular proceeding. This is especially true of the last seventeen cases, one of which, Westcott vs. Archer, 12 Neb., has been overruled in Darnell vs. Mack, *supra*. The others are wholly against the plaintiff's contention.

Thus Judge Cooley, 403-405, concludes his very clear exposition of the subject by saying:

> "The fact that process was not personally served is a conclusive objection to the judgment as a personal claim, unless the defendant caused his appearance to be entered in the attachment proceedings. When a person has property in a state and resides elsewhere, his property is justly subject to all valid claims that may exist against him there; but beyond this, due process of law would require appearance or personal service before the defendant could be personally bound by any judgment rendered."

Galpin vs. Page is not at all in point. The Supreme Court of California, in a direct proceeding had there, decided against the validity of service made, and consequently of the judgment. This adjudication was held binding on the federal courts. The judgment was in personam and the opinion is in complete harmony with Cooper vs. Reynolds and subsequent decisions of this court.

Freeman vs. Alderson, 119 U. S., declares that a personal judgment for costs can not be rendered against the defendant on default, if citation was served on him by publication only. The court, expressly approving Cooper vs. Reynolds, page 189, says that to its statement of the law

> "may be added what, indeed, is a conclusion from the doctrine, that whilst the costs of an action may properly be satisfied out of

> the property attached, or otherwise brought under the control of the court, no personal liability for them can be created against the absent or non-resident defendant."

In Hassall vs. Willcox, a judgment on mechanics' lien was rendered against a railroad under a statute of Texas, giving same and providing for its enforcement without making defendants of other lienholders. The judgment included amounts not covered by the statutory lien. It was held not to be conclusive against a prior mortgagee, not a party to the suit and having no notice whatever thereof. Had the judgment been limited to the amount covered by the statutory lien, it must have been good *inter partes*, however it might have affected prior lienholders.

Scott vs. McNeal involved the effect of judicial proceedings in probate which assumed to dispose of the estate of a living person. They were held void, as a matter of course. It is difficult to imagine what pertinency this case can have to the questions involved in this record.

It will, of course, be borne in mind that the assumption of no service whatever in the case at bar, is wholly gratuitous. We shall hereafter refer to the fact that plaintiff in the trial of the case below never offered to prove that Jardine was not its process agent, or that his appointment had been revoked. Hence, it is reduced to the present necessity of grounding its assertion of no service on the bare fact that it was made in San Miguel county, when the suit was brought and the property located in Ouray county. The most liberal view that can be taken of this circumstance reduces it to an irregularity, and one made

necessary by the absence of the agent from the county when suit was brought. Hence, it can not affect the jurisdiction of the court in an action like this.

If the judgment had been entered, as plaintiff claims, without personal service, the statutes of Colorado gave it ample opportunity for redress. Section 75 of the Code provides that

> "when, for any cause, the summons in an action has not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant, or his legal representatives, at any time within one year after the rendition of any judgment in such action, to answer to the merits of the original action."

The judgments were rendered, the executions issued, the sales made and recorded all within the year. The citations were mailed to the president of the company. It failed to avail itself of the statutory privilege just cited. It took no steps for years. When the defendant's expenditures had made the property valuable, it brought its action in ejectment, and demands that all previous proceedings against it be declared void.

FOURTEENTH AMENDMENT.

Nor do we admit the application to this case of the provisions of the fourteenth amendment to the Constitution of the United States.

This amendment, which was born of a political emergency and intended to cover a political condition,

has, in recent years, been largely utilized as a channel through which controversies can be piloted directly from the trial courts to this tribunal. We are unable to perceive its application to the facts of this case, beyond its utilization as a method of procedure or review. Its terms are broad and sweeping. They were intended to comprise the domain of national citizenship, and preserve the rights of the individual from the unjust and arbitrary operation of state regulations. Yet, they merely fix that limitation upon the powers of the states which is placed upon those of the national government by the fifth amendment.

Davidson vs. New Orleans, 96 U. S., 101.
Hallinger vs. Davis, 146 U. S., 314.

> "The general scope of the provision requiring due process of law, is to secure to every person, whether citizen or alien, those fundamental and inalienable rights of life and liberty and property which are inherent in every man, and to protect all against the arbitrary exercise of governmental powers in violation and disregard of established principles of distributive justice."

Guthrie, 14th Amendment, page 67.

If this clause of the amendment has been violated by the attaching creditors of the Cosmopolitan Mining Company, it is difficult to understand how the cases heretofore cited as sustaining judgments in rem passed the ordeal of its requirements. Definitions of the term "due process of law" are numerous and familiar. We shall not quote them. It seems sufficient to say that due process is not violated

"when the law is executed according to the customary forms and established usages of the particular state, or in subordination to the principles which underlie them."

Guthrie, page 71.

Missouri vs. Lewis, 101 U. S., 22.

Wynehamer vs. People, 13 N. Y., 378.

Railway Co. vs. Wright, 151 U. S., 470.

Mr. Justice Field, in Pennoyer vs. Neff, supra, defined due process as personal process, where judgments in personam were decreed and sought to be enforced. But, as to proceedings where property is brought under the court's control by seizure, he said:

"The law assumes that property is always in the possession of its owner in person or by agent, and proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceeding authorized by law upon such seizure for its condemnation and sale. * * * In other words, such service may answer in all actions which are substantially proceedings in rem."

Judge Brannon says:

"While to warrant judgments in personam there must be service of process in the state, or voluntary appearance, yet in all actions in the nature of cases called in admiralty proceedings in rem, such as attachments of property of non-residents, * * *

personal service is not requisite to obtain jurisdiction and give the full relief properly pertaining to the nature of the case."

Brannon, 14th Amendment, 251.

Every presumption in favor of the regularity of our judgments, and of all proceedings thereunder, attaches to courts of final jurisdiction, when collaterally assailed.

1 Black on Judgments, 270-7.

Hughes vs. Cummings, 7 Colo., 138.

Voorhees vs. Jackson, 10 Peters, 449.

Travelers Protective Assn. vs. Gilbert, 41 C. C. A., 180; 101 Fed., 46.

Sommermeyer vs. Sommermeyer, 89 Wis., 66; 61 N. W., 311.

And this is especially true when the court decides upon its own jurisdiction, as was actually done here.

Fairchild vs. Fairchild, 53 N. J. Eq., 678; 34 Atl., 10.

Bruce vs. Osgood, 154 Ind., 375; 56 N. E., 25.

Otis vs. Rio Grande, Woods, 279.

Hahn vs. Kelly, 34 Cal., 391; 94 Am. Dec., 742.

And these aids are extended to defects of service.

1 Black on Judgments, 224.

They apply to proceedings and executions, to the sale of the sheriff and the deed of the purchaser. This

is so by the statute of the state, and by the weight of authority.

3 Freeman on Executions, section 339.

These intendments in favor of regularity, applied to the proceedings of courts of general jurisdiction, are not at all affected by the contention of the plaintiff in error, nor is it apparent that any peculiar or discriminative mode of procedure was resorted to against the plaintiff in error in the proceedings which are now so vigorously assailed. Nor is it apparent that the state is without power to provide proper regulations and procedure for subjecting the property of non-residents to the payment of legitimate claims of resident creditors. The proposition, therefore, resolves itself into the question of whether what is claimed to be a defective service of process, followed by judgment execution and sale, constitutes a violation of the due process clause of the fourteenth amendment to the Constitution of the United States. We assert that it does not, and that the contention has been forced into the record merely to authorize the plaintiff in error to invoke the jurisdiction of this court. The following authorities, bearing generally upon the question, are submitted:

The question whether a proceeding is due process of law, within the meaning of the Constitution, is independent of the question whether it was by a motion or ordinary action, provided the form sanctioned by the state law gives notice and affords an opportunity to be heard.

Iowa Central Ry. vs. Iowa, 160 U. S., 389.

It is within the power of the legislature to authorize a suit against a foreign corporation in personam, and such power is not limited to the allowance of actions in rem only. There is nothing constitutional or fundamental in the method of procedure in an action.

Barnett vs. Chicago Co., 4 Hun., 114.

The statute of Ohio, which authorizes a proceeding in rem against all vessels for debts and liabilities contracted for the use of the same, is not unconstitutional as depriving a citizen of his property without due process of law. The seizure of the boat or vessel is sufficient notice to the owner to confer jurisdiction.

Luther vs. Fowler, 1 Grant's Cases, 176.

Revised Statutes of Texas, article 1230, provides that, when the defendant is a non-resident, the clerk shall address a notice to him, requiring him to appear and answer at a specified time and place, and shall send him a certified copy of the petition. *Held*, that as a judgment against a firm, and against a resident partner, individually bound the firm assets only so far as it concerned a non-resident partner served with notice according to the statute, the statute was not unconstitutional as authorizing a judgment without due process of law.

Sugg vs. Thornton, 132 U. S., 524.

The legislature may authorize service on the agent of a foreign corporation to be the basis for a judgment in personam.

McNichol vs. U. S. Agency, 74 Mo., 457.

"A distinction must be borne in mind between a case where there is no service or no publication, and one which is defective, but which the proper court has judged to be sufficient, and upon such on adjudication rendered a final decree in the case. These principles, so essential to the stability of judicial titles, have had the sanction of the Supreme Court of the United States, and have been vindicated and enforced with great clearness and strength of reasoning in several of its published judgments." Citing Voorhees vs. Bank, 10 Pet., 449; Cooper vs. Reynolds, 10 Wallace, 308.

"Views not in harmony with these have, we are aware, been sometimes held, but their undoubted effect is to encourage the picking of flaws in deeds and judicial proceedings in which confidence has been long reposed, thereby promoting litigation and precipitating upon the community all the manifold evils of insecure titles. It is, in our judgment, a misfortune to any state where these views receive judicial sanction, and especially in the new states where property is rapidly advancing in value."

Smith vs. Pomeroy, 2 Dillon, 414; 22 Fed. Cases, 625.

It is well said by Mr. Guthrie, that

"the question is more legislative than judicial, and in each case the primary in-

quiry must be as to what is the system of law of the particular state, and whether, according to that law, as adjudged by its courts, the proceeding in question is due process; and the secondary inquiry must be whether in that process of law, if followed, there is any violation of the fundamental rights secured by the federal Constitution."

Guthrie, Fourteenth Amendment, page 72, citing

McNulty vs. Cal., 149 U. S., 645.

Kennard vs. Louisiana, 92 U. S., 480.

We take it that a judgment rendered without due process of law will be so independent of the recitals of the fourteenth amendment. The requirement is a fundamental principle of Anglo-Saxon jurisprudence, and lies far deeper than any expressed constitutional inhibition. Unfortunately for the plaintiff in error, the record in this case fails to disclose any disregard of its requirements.

But we deny that the mere assertion in the pleadings that the controversy involves the application of the fourteenth amendment, followed by no proof showing the existence of a constitutional question, gives the right to an appeal direct to this court under the act of 1891. None of the authorities cited by counsel so hold.

Loeb vs. Trustees was one in which the court investigated the right, under the act of 1891, of a party to prosecute an appeal to the United States Supreme Court where it had been claimed in the court below that a state statute was in contravention of the fed-

eral Constitution, and in which it was held that this fact might be ascertained from the opinion of the court.

Connelly vs. Union Sewer Pipe Co., 184 U. S., was a case in which the jurisdiction of the Supreme Court on writ of error to the Circuit Court under the act of 1891, when the constitutionality of a state statute was in question, was held to extend to all cases in which such question is decided against the claim of either party, and, therefore, to include a case in which the writ of error was taken by a defendant, who set up in defense of the action a statute which the court below held unconstitutional.

Holder vs. Aultman Mills Co. was a case in which suit was brought to the Supreme Court from the Circuit Court, under the act of March 3, 1891, and in which the Supreme Court held that its jurisdiction did not depend upon the question of whether or not the right claimed under the United States Constitution has been upheld or denied in the court below, and was not limited to the constitutional question, but included the whole case. The claim had been that under a Michigan statute making void all contracts made in the state by any foreign corporation which had not filed its articles of association and paid its franchise tax, and a contract made elsewhere than in Michigan was valid, although it was to be performed in that state. The court had held that the Michigan statute, so far as it affected the contract in question, was in violation of the Constitution of the United States.

Gear vs. Alkali Works, 190 U. S., 428, was a case in which the service of summons was made in

the state on resident directors of a foreign corporation, and it was held that this was insufficient to give the court jurisdiction of such corporation, where at the time of such service it had ceased to do business within the state, and had designated no agent on whom service could be made. The suit had been brought in the state court and removed to the federal court upon the claim that there was a separable controversy, etc. There is no discussion in this case upon the right to take an appeal to the Supreme Court of the United States, nor any statement as to the clause under the act of 1891, on which it was appealed.

Conley vs. Matheson Alkali Works, 190 U. S., is a similar case in which service of summons was had within the state on resident directors of a foreign corporation, and it was held insufficient to give the court jurisdiction of such corporation, where, at the time of such service, it had ceased to do business within the state, and had designated no agent upon whom service could be made. Evidence was taken before a master on the question of the cessation of business and non-declaration of agent, but the court does not discuss or decide any question with reference to the appeal to the Supreme Court.

Neither of the two last cases decided hold or state that the appeal in fact was taken upon the ground that there had not been due process of law. There is a certificate by Judge Marshall in the record, but under the act of 1891 the only instances in which certificates may be given for the purpose of appeal under the act of 1891 are, (1) by the Circuit Court of Appeals as to questions with reference to which

it desires the advice of the Supreme Court; (2) a certificate by the Supreme Court when the question of the jurisdiction of the Circuit Court has been decided, etc. The certificate by Judge Marshall does not relate to the question of the jurisdiction of the court, so that it would seem that no appeal would lie in this case because of the alleged question with regard to due process of law. There was no claim in the court below and no decision upon any claim, that a state statute relied upon or invoked by either side, was in contravention of the federal Constitution.

The certifying of a question to the Supreme Court by the Circuit Court is discussed in Blythe vs. Hinckley, 173 U. S., 506; the Paquet Jabana, 175 U. S., 684.

Where the question of the jurisdiction of the Circuit Court has been decided, that question alone can go to the Supreme Court or the whole case may be taken to the Circuit Court of Appeals. The election must be made by the appellant.

Maynard vs. Heckt, 151 U. S., 326.

In Cincinnati Ry. Co. vs. Thiebau, 177 U. S., 620, the Supreme Court held that where the constitutionality of a state law was first raised on an assignment of errors in the Circuit Court of Appeals, it would sustain the writ of error under the act of 1891.

Penn. Mutual Life Ins. Co. vs. Austin, 168 U. S., 695, holds that a real and colorable claim that a state statute is unconstitutional must exist.

Carey, etc., vs. Houston, etc., Ry. Co., 151 U. S., 81, holds that it must be the controlling question in the case.

DEFENDANT A STRANGER TO ATTACHMENT PROCEEDINGS.

Although the subject is not discussed in their brief, counsel have nevertheless not overlooked the strength of the defendant in error as a third party to the transaction which they assail. The defendant in error is a purchaser under judicial sale of the premises in controversy. He was not a party to the record of the judgments, and his connection with the premises dates from his purchase of the certificate of sale executed by the sheriff under the statutes of Colorado. The plaintiff in error can not divest his rights as an innocent purchaser which vested before any assault was made upon the judgment, the same being, upon its face, regular and free from uncertainty.

Hunter vs. Ruff, supra.

> "The result deducible from a majority of the cases seems to be that it is only when the judgment appears upon its face to have been rendered without jurisdiction that it can be considered a mere nullity for all purposes."
>
> 1 Black on Judgments, section 218.
>
> 1 Freeman on Judgments, sections 116, 126.
>
> 2 Freeman on Executions, section 308.

This court, in Voorhees vs. Bank, supra, has declared:

> "The purchaser is not bound to look beyond the decree when executed by a convey-

ance, if the facts necessary to give jurisdiction appear on the face of the proceedings; nor to look further back than the order of the court."

Sumner vs. Moore, 2 McLean, 63.

Bank vs. Hughes, 10 Mo. App., 12.

May vs. Logan County, 30 Fed., 255.

Town, etc., vs. Coolidge, 89 Ill., 534.

Tucker vs. Harris, 13 Ga., 10.

Board, etc., vs. Markle, 46 Ind., 110.

Wisdom vs. Buckner, 31 La. Ann., 38.

Bank vs. Peters, 51 Kan., 69; 32 Pac., 628.

Jones vs. Talbott, 9 Mo., 124.

Every doubt should be resolved in favor of the validity of a judgment, where the rights of a bona fide purchaser are involved.

McGowan vs. Lufburrow, 82 Ga., 323; 14 Am. St. Rep., 178.

Hudepohl vs. Water Co., 94 Cal., 388; 28 Am. St. Rep., 149.

A judgment in attachment proceedings is conclusive on parties and privies so far as the attached property is concerned.

Bank vs. Peters, 51 Kansas, 69.

SHERIFF'S SALE CAN NOT BE ATTACKED.

Neither can the sheriff's sale be attacked in this proceeding. It appears from the record that the

premises were levied upon and sold under the execution in the Begole case. (Transcript, pages 72-73.) The return of the sheriff reads:

> "In obedience to the command of the within execution, I have executed the within writ by offering for sale on the 24th day of August, 1895, in the manner provided by law, and selling the property described in said writ, at public sale at the front door of the court house, in the city and county of Ouray, Colo., that said mining claims were first offered for sale separately; receiving no bids on said claims, I offered the same for sale all together. That in accordance with an agreement entered into by and among the several prorating judgment creditors, the same was struck off and sold to J. C. Marsh, as trustee, for the several judgment creditors, for the sum of $1,616.97; and I therefore return this execution fully satisfied."

The court made a prorating order for the distribution of the amount realized from the sale, and the money was distributed accordingly. Whether this was done properly or improperly, lawfully or unlawfully, wisely or unwisely, is no concern of the defendant in error.

Section 2546, Mills' Annotated Statutes, requires the sheriff,

> "upon the sale of lands on execution, to give to the purchaser a certificate in writing, describing the lands or tenements purchased,

> the sum paid therefor, the amount of bid, and the time when the purchaser would be entitled to deed for the said lands, unless the same be redeemed."

A duplicate of this certificate is required to be recorded by the officer. Section 2547 fixes the time of redemption by the debtor at six months. Section 2548 gives an additional three months to the judgment creditors of the debtor. Section 2552 makes the certificate of purchase assignable. Section 2553 provides the form of conveyance to be executed by the sheriff in the event of non-redemption. By section 2525 it is provided that:

> "Any deed so executed shall be evidence that the provisions of the law in relation to sales of land upon execution were complied with, until the contrary shall be shown, and such deed shall be considered as conveying to the grantee therein named all the title, estate and interest of the defendant or defendants in the execution therein named, in and to the lands thereby conveyed, of whatsoever nature the same may be, but which deed shall not be construed to contain any covenant upon the part of the officer executing the same."

A deed complying with these requirements being made, evidence that the provisions of the law in regard to sales were complied with is not the subject of attack in a proceeding like this.

Jackson vs. Spenk, 59 Ill., 404.

Freeman on Executions, section 339.

Jenkins vs. Merryweather, 109 Ill., 647.
Keith vs. Keith, 104 Ill., 397.
Smith vs. Schlink, 62 Pac., 1044; 15 Colo. App., 325.

It is contended that the sheriff's sale is void because the judgment in the Fulton case was void, and one of the executions to be satisfied was issued upon such judgment. Also that the sale was of more than sufficient property to satisfy the other judgments, was void as to the excess, and, being void as to the excess, the entire proceeding is void. The claim that the Fulton judgment is void is a bold assumption, without a line of the record to support it. The proposition is sought to be sustained by the case of Bassick M. Co. vs. Schoolfield, 10 Colo., 46, which involved a direct proceeding on the part of the execution debtor to set aside the sale prior to the execution of sheriff's deed, and the sale was avoided because the special execution directed the sale of mining premises not covered by the mechanic's lien decree. The difference between the facts of that case and the one at bar is obvious. There is no pretense here but that the lien of the attachment and judgment and therefore that the execution extended over and required the sale of all of the property in controversy. If we should, for the sake of the argument, concede the pertinency of the Schoolfield case to the case at bar, reference to the subsequent case of Ryan vs. Staples, 76 Fed., 726, robs it of all value. Ryan vs. Staples was the outgrowth of the Schoolfield case. The title of Ryan resulted from a sale of the premises subsequently made in accordance with the Schoolfield decree. The title

of Staples was based upon the original sale, resulting in the suit of Ryan vs. Staples, in which the Circuit Court of Appeals rejected the decision of the Colorado Supreme Court, validated the sale there overthrown, and sustained the title of Staples. Judge Thayer, page 727, said:

> "We are of the opinion that the decision in Mining Co. vs. Schoolfield can not be regarded as a decision construing a local statute, in such sense that it is binding upon this court. The question whether a judgment is void, or simply erroneous, is one which depends for its determination upon the general principles of the common law, and upon a consideration of all the authorities, excepting in those cases where the decision turns upon the construction of local statutes, which either define and limit the jurisdiction of the court by which the judgment was rendered, or prescribe the manner in which jurisdiction over the parties or the subject-matter shall be acquired."

It also appears in that case that the judgment under which the execution sale was had, and by which Staples acquired his title, had been reversed some days before the sale took place. This fact was not allowed to affect the title of Staples, who, as a bona fide judgment creditor, had redeemed from the prior sale. He was a stranger to the judgment, and, therefore, not bound by the subsequent proceedings affecting its regularity.

The statement that the Fulton judgment was a nullity is wholly gratuitous. The record offered

showed the same service against the same defendant, and ~~levy of attachment on the same property in the same manner as in the other cases. As a~~ judgment was prorata under the statute with the others ~~from it is good against collateral attack.~~

Nor is the claim of an excessive sale any more meritorious. Were this a direct proceeding between the plaintiff in error and its judgment creditors, this contention would be unimportant. As against Walsh, it is absolutely without merit. It appears from the return of the sheriff that the property was first offered in parcels, and then sold en masse. We have seen that, under the provisions of the Colorado Code of Practice, any surplus accruing from the sale of attached property must be paid over to the defendant. It is true that the officer should discontinue his sale when he has realized enough to satisfy his writ. If, however, property be sold en masse, the debtor is protected to the extent to which the amount realized at such sale is increased. Either he or his other creditors are entitled to any surplus resulting from such sale. If, on the contrary, he can realize no more than enough to satisfy the writ, and the sheriff were obliged to reject all bids for a greater amount, he would not only disregard his duty, but violate the most obvious principles of natural justice. Even in such a case, however, the execution defendant should make his application to set aside the sale in seasonable time.

Freeman on Execution, volume II, section 296.

The title of the purchaser is only subject to such equities, liens and conditions of which he may have

had notice, and to the effects of these only as are revealed by the judgment and execution.

De Lany vs. Knapp, 111 Cal., 165; 52 Am. St. Rep., 160.

Williamson vs. Jones, 43 W. Va., 56; 264 Am. St. Rep., 891.

East Tenn. C. & I. Co. vs. Wiggin, 68 Fed. Rep., 446.

Luton vs. Soper, 94 Mich., 202.

Maroney vs. Boyle, 141 N. Y., 462; 38 Am. St. Rep., 821.

Meek vs. Skeen, 60 Fed. Rep., 322.

Duff vs. Randall, 116 Cal., 226; 58 Am. Rep., 158.

The manner or regularity of the execution sales in no manner affects the jurisdiction of the court, either of the subject-matter or of the parties. Hence, they can not be inquired into in a collateral proceeding, where the record assailed is proof against all attack not founded on want of jurisdiction.

Murfree on Sheriffs, section 704.

Osgood vs. Blackmore, 59 Ill., 261.

Rigney vs. Sewell, 60 Ill., 416.

The five cases cited by counsel in support of their proposition that, "where more property is sold at a single judicial sale than is sufficient to pay the judgment, the whole sale is utterly void," are neither "numerous nor unanimous." If they were, they could not affect the rights of the defendant in error as a bona fide purchaser for value.

Peterson vs. Corneal, 3 A. K. Marshall, 618, arose under a statute expressly forbidding the sale of a greater portion of the debtor's property than might be necessary to pay the judgment and costs. No precedent levy of attachment, or otherwise, had been acquired of the property sold, and it clearly appeared that the statute had been violated.

Blakely vs. Albert, 3 Dana, 185, was a sale under a decree, prohibiting the sale of more than sufficient property to satisfy the claim. The sale violated the order, and was set aside on objection to its confirmation.

Lockwood vs. Sturtevant, 6 Conn., 373, was an executor's sale, made by order of court and in violation thereof.

In Hastings vs. Johnson, 1 Nev., 613, the sale was held void because the amount inserted in the execution was grossly in excess of the amount of the judgment, and, the execution being declared void, the sale thereunder was a nullity.

Adams vs. Morrison, 9 N. H., we have been unable to find.

A sale may be vacated in direct proceeding for various irregularities if instituted in time, but it may not be attacked as the attempt has been here made.

Freeman on Executions, section 308.

They are sometimes void, but not because more money was realized therefrom than the amount called for in the execution under which the sale is made. Mr. Freeman, Executions, sections 283 and 339, instances the various judicial sales which are void. The defect contended for by counsel is not among them.

If made by fraudulent combinations of bidders, or after sunset, or at the wrong place, or en masse in some states, or for less than two-thirds of appraised value in others, or for the benefit of the sheriff or his deputies, or in defiance of the directions of the law, or the decree, or of personalty when it is not present, or of personalty when the part sold is not segregated, or on satisfied judgments, or made privately, or under process forbidden to issue, they are nullities. Otherwise they are voidable at the worst, and titles acquired by innocent purchasers can not be affected by them, if the defects are not taken advantage of before deed issues for the property affected.

In short, their claim that the Fulton judgment was in any way connected with the other judgments, or united with them in the order of sale, reduced the case to one in which the sale was made for more than the amount of the valid judgments, and the excess, instead of being paid to the judgment debtor, as the statute provides, was wrongfully, utterly without authority, let it be conceded, or upon a void order, paid to Fulton, leaving the rightful owner with a claim against the sheriff or Fulton, but the sale remains absolutely valid, the executions are valid, and the title conveyed by the sheriff's deed perfect. Were this not so, and had there been a wrongful sale of more property than was necessary, it would be voidable, not void, and could not be assailed collaterally, as is pointed out in section 34 of Freeman on Void Judicial Sales, 4th edition. On the other hand, if the Fulton judgment was entered under the pro rating statute, from which it seems that he did all the statute required, then his judgment attached to the lien and the judgment obtained in the Begole and other cases, and

it would seem that the showing as to citizenship, doing of business, and the like, would be treated as being in one proceeding initiated by the Begole judgment, and therefore the Fulton judgment was valid and should have been admitted.

The fact that the judgments were in personam in form is not material. This in nó manner militates against their validity as judgments in rem.

> "The judgment of the court, though in form a personal judgment against the defendant, has no effect beyond the property attached in that suit. No general execution can be issued for any balance unpaid after the attached property is exhausted."

Cooper vs. Reynolds, supra.

Brown vs. Tucker, 7 Colo., supra.

Johnson vs. Dodge, 19 Iowa, 106.

Payne vs. Witherspoon, 14 B. Mon. (Ky.), 270.

Mickey vs. Stratton, 5 Sawyer, 475.

Packard vs. Matthews, 9 Gray, 311.

Barrelli vs. Wagner, 5 Tex. Civ. App., 445; 27 S. W., 17.

The executions issued by the Ouray County Court were special, directed against the attached property, requiring the sheriff to sell them, and them only, for the satisfaction of the respective judgments. This mandate was implicitly obeyed, and satisfaction of the judgments resulted. The form of the judgment entries, the manner of the sale, the return of the officer, and the distribution of the proceeds by the County Court, are matters affecting the plaintiff in error, the officers and the distributees. They can not disturb the title of the defendant in error, or subject him either to liability or annoyance. As to this branch of the controversy, we may say, in the language of Mr. Justice Miller, that:

> "There is a sufficient writ of attachment, its levy and return, the judgment of the court, * * * the order to sell the property, the sale under the writ of *conditioni exponas*, the writ of possession, sheriff's deed and actual delivery of possession under order of the court. To hold them void is to overturn the uniform course of decisions in this court, to unsettle titles to vast amounts of property, long held in reliance on those decisions, and, in our judgment, would be to sacrifice sound principle to barren technicalities."

THE PLAINTIFF'S ~~FIFTH~~ FIFTH SPECIFICATION OF ERROR—THE JUDGMENT QUIETING TITLE.

This relates to the record in the case of Walsh vs. Cosmopolitan Mining Company and J. M. Jar-

dine, instituted by plaintiff in the District Court of Ouray county, on the first day of March, 1897, under section 255 of the Colorado Code, providing that

> "an action may be brought by any person in possession by himself or by tenant of real property against any person who claims an estate therein adverse to him, for the purpose of determining such adverse claim, estate or interest;"

and in which, on the 11th day of May, 1897, a decree (Transcript, pages 49-51) was duly entered in accordance with the recitals of the complaint. The summons in that case was served as to the defendant by delivering a copy thereof, together with a copy of the complaint, in Ouray county, to John M. Jardine, the duly authorized agent of the defendant company, and designated by it as the person upon whom process should be served. Jardine was himself made a party to the action, but filed a disclaimer (Transcript, page 46), alleging that his interest in the controversy arose from the fact that the summons in the original actions had been served upon him as agent of the defendant company, which writs he had duly mailed to the president of the company, with postage fully paid thereon, in envelopes with return card printed thereon, which letters were never returned to him, in consequence of which he allowed judgments to be taken without interposing any defense on the merits, since which time and the sale of the premises he had not claimed or pretended to claim any interest therein adverse to the plaintiff.

The objection of the plaintiff in error to the admission of this record goes to the manner of service, to the recitals of the decree, and to its alleged failure to state that the defendant company at the time of suit was doing business in the state.

CHARACTER OF SERVICE.

The argument heretofore urged in support of the judgments in the attachment suits considered as personal judgments rendered upon valid legal service need not be repeated here, for the service is in all respects the same, except that it was made upon Jardine, who was found within the limits of Ouray county, and the return refers to him as the agent designated by the defendant company for the service of process upon it. In addition to these facts, it may be stated that the plaintiff alleges, and the decree determines, that the defendant company was organized to do business in the county of Ouray, state of Colorado; a circumstance to which his Honor Judge Marshall adverted in overruling the plaintiff's objection to the introduction thereof. His Honor said (Transcript, page 57):

> "That it appears by the decree of the court that this corporation was organized to do business in the state of Colorado; that that was one of the objects for which it was organized; that it did appoint an agent under the law of Colorado who was authorized by the corporation to receive service of process, so that the authority of this agent to re-

> this service appears affirmatively on the face of this record. * * * He was authorized by the corporation to receive service of process in the state of Colorado—that is the allegation—and that the corporation was by its charter not only authorized but was formed for the very purpose of carrying on a part of its business in the state of Colorado. I think it sufficiently appears in this suit to quiet title that the court has jurisdiction of the defendant."

It will be observed that the service in this case in all respects complies both with the Code and section 499. The former requires service on an agent *found* in the county. The place of his residence is immaterial. The latter designates the agent on whom process *may* be served, without reference to the venue of the suit. If such service does not bring the company under the jurisdiction of the court, what does?

The disclaimer of Jardine, being a part of the record, is important. It discloses that actual notice of the previous suits was given to the president of the plaintiff in error, and that the failure of the agent to make a defense to them resulted from the failure of the president to respond to the notices. Counsel have sought to distort this appearance and disclaimer by asserting its disclosure of some collusive understanding or arrangement between Jardine and Walsh, whereby the interests of the defendant company were prejudiced. We do not care to notice this insinuation farther than to remind both court and

counsel that no charge of fraud appears, either in the pleadings, testimony or the assignment of errors. The judgments forming the basis of our title are not assailed for any such reason. No such claim was made below or in the pleadings. No opportunity has been given defendant to meet it or to test the good faith of plaintiff in bringing or prosecuting this action. Hence the reflections of counsel are not only unworthy of them, but entirely out of place in the consideration of the questions involved in this record.

IS DECREE IN PERSONAM OR IN REM?

The record in this, as in the other judgments, is assailed wholly upon the ground that the proceeding is one in personam, and therefore void. Thus counsel say that

> "the court erred in admitting in evidence the record in the Walsh case, first, because the action was one in personam and not in rem; second, because it nowhere appears in the record that the defendant company was doing business in the state of Colorado when service was made upon Jardine; and, third, the court attempted, by the mere force of its decree, to establish a title in Walsh."

We might concede the personal character of the case in Walsh vs. Cosmopolitan M. Co., and still successfully contend for its validity under all the authorities heretofore cited, as the service was personal and made in all respects as required by both

the Code and the General Statutes concerning foreign corporations. But here again counsel labor under a delusion. The proceeding is a statutory one, and partakes of all the characteristics of a proceeding in rem. In all essential respects the proceeding is one in rem, and has been so decided on more than one occasion by this court.

The general proposition that in the rendition and enforcement of decrees a court of equity acts upon the person may be conceded, as well as the other proposition that a decree will not of itself effect a conveyance. Both of them are in harmony with the now conceded doctrine that statutory proceedings to quiet and remove clouds from title partake of the nature of proceedings in rem, and that a decree adjudicating that a defendant has no title needs no further affirmative action for its effectual operation.

Counsel quote correctly from the opinion of Mr. Justice Gray, in Hart vs. Sansom, 110 U. S., 151. A bill in that cause was filed in virtue of the general jurisdiction of a court of equity for the removal of a cloud upon title, and it could have had no basis elsewhere. The statutes of Texas were expressly declared by Mr. Justice Gray to have no relation to the subject-matter of the suit. Not only so, but his Honor expressly declared that the only part of the decree in that case affecting Hart's interests was that relating to costs.

The case of Arndt vs. Griggs, 134 U. S., 316, was a bill to quiet title, brought under the provisions of sections 37 and 38 of the compiled laws of Nebraska, both of which sections, together with sections 77, 78, 82 and 429-b of the Nebraska Code are quoted by Mr.

Justice Brewer in the opinion. It is there expressly declared that by well settled rules an action to quiet title is a suit in equity, that equity acts upon the person; and that the person is not brought into court by service by publication alone; but they do not apply when a state has provided by statute for the adjudication of title to real estate within its limits as against non-residents who are brought into court only by publication.

> "The question is not," says the court, "what a court of equity, by virtue of its general powers and in the absence of a statute, might do, but it is, What jurisdiction has a state over titles to real estate within its limits, and what jurisdiction may it give by statute to its own courts to determine the validity and extent of the claims of non-residents to such real estate? If a state has no power to bring a non-resident into its courts for any purposes by publication, it is impotent to perfect the titles to real estate within its limits held by its own citizens; and a cloud cast upon such title by a claim of a non-resident will remain for all time a cloud, unless such non-resident shall voluntarily come into its courts for the purpose of having it adjudicated. * * * It has control over property within its limits; and the condition of ownership of real estate therein, whether the owner be stranger or citizen, is subjection to its rules concerning the holding, transfer, liability to obligations, private or public, and the modes of establishing title

thereto. It can not bring the person of a non-resident within its limits—its process goes not out beyond its borders—but it may determine the extent of his title to real estate within its limits; and for the purpose of such determination may provide any reasonable methods of imparting notice. The well-being of every community requires that the title of real estate therein shall be secure, and that there be convenient and certain methods of determining any unsettled questions respecting it. The duty of accomplishing this is local in its nature; it is not a matter of national concern, or vested in the general government; it remains with the state; and as this duty is one of the state, the manner of discharging it must be determined by the state, and no proceeding which it provides can be declared invalid, unless in conflict with some special inhibitions of the Constitution, or against natural justice. So it has been held repeatedly that the procedure established by the state, in this respect, is binding upon the federal courts."

A review of many decisions upon the same subject follows, and copious quotations made from some of them. It is then expressly declared that the jurisdiction of a court over the controversy is founded on the presence of the property, and, like a proceeding in rem, it becomes conclusive against the absent claimant as well as the present contestant.

The previous decision of Hart vs. Sansom is then clearly defined.

"The question there was as to the effect of the judgment. * * * That judgment was that the plaintiffs recover of the defendants the premises described; 'that the several deeds in plaintiffs' petition mentioned be, and the same are hereby, annulled and cancelled, and for naught held, and that the cloud be thereby removed;' and for costs, and that execution issue therefor. This was the whole extent of the judgment and decree. Obviously, in all this there was no adjudication affecting Hart. As there was no allegation that he was in possession, the judgment for possession did not disturb him; and the decree for cancellation of the deeds referred specifically to the deeds mentioned in the petition, and there was no allegation in the petition that Hart had anything to do with those deeds. * * * An additional ground assigned for the decision was that if there was any judgment (except for costs) against Hart, it was, upon the most liberal construction, only a decree removing the cloud created by his pretended claim of title, and therefore, according to the ordinary and undisputed rule in equity, was not a judgment in rem, establishing against him a title to the land. But the power of the state, by appropriate legislation, to give a greater effect to such a decree was distinctly recognized, both by the insertion of the words 'unless otherwise expressly provided by statute,' and by adding: 'It would doubtless be within the

> power of the state in which the land lies to provide by statute that if the defendant is not found within the jurisdiction, or refuses to make or to cancel a deed, this should be done in his behalf by a trustee appointed by the court for that purpose.' "

The decision in Arndt vs. Griggs justifies the assertion that Hart vs. Sansom has no application to the case at bar, the latter being founded upon a statute in all essential particulars like that of Nebraska. The service against the Cosmopolitan Company was upon an agent and not by publication. It is, therefore, a stronger case than the one cited.

The estate claimed adversely, under section 255, Colorado Code, may be any sort of a claim, legal, equitable or otherwise asserted, or about to be asserted, by one out of possession. And it clearly applies to residents and non-residents alike, for, by section 2535 of Mills' Annotated Statutes, it is provided that:

> "In all actions pending in any court of record in this state, or which may hereafter be brought in any such court, wherein any defendant is not found within the jurisdiction of the court, and constructive service alone is had, and which is brought for the enforcement of an express, implied or resulting trust, or for the removal of cloud from title to real estate, or for specific performance, or for the establishment of a lost or destroyed deed, conveyance or instrument in writing not properly proved and acknowl-

edged, or in any other proceeding in rem, or affecting only specific property, where, according to the usual practice in courts of chancery, the court, if the defendant had been properly served, might direct or decree any act to be done or performed by the defendant in favor of plaintiff, the court may appoint a trustee for such defendant to do and perform, in the place and stead of and for such defendant, the acts required by the decree rendered in any such cause. Any act lawfully done by such trustee, under and in pursuance of any such decree, shall be as binding and effectual for all purposes as if done and performed by the defendant in pursuance of such decree."

The sections quoted endow courts of equity with full power and authority to settle title to real estate within the boundaries of the commonwealth as against all persons, including non-residents. To deny, in Walsh vs. Cosmopolitan Company, the efficacy of a decree in rem affecting real estate is virtually to deny the efficacy of our statutes and the authority of Arndt vs. Griggs, the doctrine in which has been recognized and enforced in

Perkins vs. Wakeham, 86 Cal., 583; 21 Am. St. Rep., 70; 25 Pac., 52.

Lantry vs. Parker, 37 Neb., 357; 55 N. W., 564.

People vs. Simon, 176 Ill., 177; 68 Am. St. Rep., 184; 52 N. E., 915.

Corson vs. Shoemaker, 55 Minn., 399; 57 N. W., 139.

Porter Co. vs. Baskin, 43 Fed., 328.

Lynch vs. Murphy, 161 U. S., 251.

Knudson vs. Litchfield, 87 Iowa, 121; 54 N. W., 201.

Oldham vs. Stephens, 45 Kan., 371; 25 Pac., 864.

Scarborough vs. Myrick, 47 Neb., 800; 66 N. W., 869.

Association vs. Matthews, 13 Tex. Civ. App., 425; 35 S. W., 691.

Connor vs. Tenn. Central Ry. Co., 109 Fed., 931.

Tyler vs. Judges of Registration (Mass.), 55 N. E., 812.

In Hamilton vs. Brown, 161 U. S., 275, the doctrine of Arndt vs. Griggs is not only expressly approved, but emphasized by the fact that the case arose in Texas, under a statute providing for the escheat of land of persons dying intestate and without heirs. The proceedings were had on scire facias, followed by a judgment in favor of the escheat. The proceeding was held to be conclusive upon the persons named in the petition, the court expressly declaring it to be within the power of the legislature of Texas to provide for determining and quieting title to real estate within the limits of the state, and within the jurisdiction of the court after actual notice to all known claimants, and notice by publication to all other persons.

Cooper vs. Newell, 173 U. S., 555, presented the question whether the judgment of the District Court of Brazoria county, Texas, in favor of one McGrael

against Newell was open to the attack made upon it in the Circuit Court of the United States for the Eastern district of Texas. The judgment assailed was rendered in an action at law known as trespass to try title, no service having been made upon Newell, for whom an attorney without any authority entered an appearance. It was held that the judgment could be so attacked. Apart from the fact that the action was not one to quiet title, the court again declared it to be within the power of the legislature of Texas to provide for determining and quieting title to real estate on the authority of Arndt vs. Griggs, and emphasized the fact, and that no such statute existing at the time of the commencement of McGrael vs. Newell, it could, therefore, be regarded as only a personal action and coming within the rule laid down in Pennoyer vs. Neff.

> "The record does not show that any process was issued on the petition and served on Newell, or any notice given to Newell by publication or otherwise, or affirmatively that the person signing the demurrer and pleas was authorized to do so."

In Roller vs. Holly, 176 U. S., 398, another case from Texas, the doctrine of Arndt vs. Griggs was reaffirmed, but the notice of the suit requiring a defendant residing in Virginia to appear and answer the suit in Texas within five days was declared unreasonable, and therefore the judgment rendered on such service was not binding upon the defendant.

The case of Wall vs. Magnes, 17 Colo., 476, cited by counsel, very properly declares that section 255

of the Colorado Code simply recognizes, in statutory form, the former chancery proceeding. That is merely a statement of a self-evident fact. The same remark is equally applicable to the Nebraska statute involved in Arndt vs. Griggs. The Colorado case was, however, *one between two citizens of that state*, and, therefore, involved neither a consideration of section 2535, Mills' Annotated Statutes, nor the application of the Code to *adverse claims of non-residents*. It will not be asserted that the old equity proceeding could be made to operate in rem under any circumstances, and can not be successfully contended that the Colorado statutes heretofore quoted only become effective in cases where actual personal service of the defendant is obtained. Such a construction would defeat both the language and the purpose of the sections.

We have found nothing in the other cases cited by counsel in this division of the argument to militate against our proposition. United States vs. Bell Tel. Co., 29 Fed., 17, was a suit brought to cancel, or, failing in that, to modify certain patents to Graham Bell, and owned by the defendant. Service was had upon the officers of two subsidiary companies in Ohio, alleged to be the agents and partners of the foreign corporation. A motion to quash and plea in abatement were filed on special appearance by the defendant, and both were sustained. Not the slightest element of a proceeding in rem is disclosed in any stage of that proceeding. Not only so, but it appeared that the parties served were neither partners, nor managing agents, nor were there other representatives of the defendant company in Ohio.

The same comments are equally applicable to the case of Henning vs. Planters Ins. Co., 28 Fed., 440.

The cases of Swan vs. Ins. Co., 100 Fed., 922, and Friedman vs. Ins. Co., 101 Fed., 535, have been confessedly overruled by the case of Insurance Co. vs. Phelps in this court, in 190 U. S., hence we think no serious attention need be given them.

People vs. Com. Alliance Ins. Co., 40 N. Y. S., 269, was a claim against a receiver, based upon a judgment previously recovered against it in Maine. It was a judgment in personam, obtained upon service after the company had formally withdrawn from the jurisdiction of that commonwealth, and therefore rendered without jurisdiction. The same criticism is applicable to Mutual Reserve Assn. vs. Boyer, 61 Pac., 387.

In Millan vs. Insurance Co., 103 Fed., 764, the defendant having long prior to the action ceased to do business in the state, and expressly revoked its agent's authority, the court, on motion to quash, held that jurisdiction to render a personal judgment against a non-resident can only be acquired by personal service of writ of summons on the party or by his voluntary appearance. It appears that in each of these instances the defendant company had formally withdrawn its legal presence and agents from the state in which the action was brought. With the exception of Hart vs. Sansom, none of them were actions either to quiet title or remove cloud therefrom. On the contrary, they were based upon some personal demand, or to enforce some personal claim. If the Virginia case, for example, had been one to quiet title to real estate in the commonwealth of Virginia, or the seizure of property by way of attachment, the decision would not have been here quoted by plaintiff in error.

But the distinctive feature of the court's decision consists in the fact that the service was not made in accord with the act of May 18, 1887, relating exclusively to assessment companies. It was held that the other statutory provisions relating to foreign corporations in general could not apply to assessment companies, and the act expressly applying to them must be observed in the manner of serving process.

Eureka Co. vs. California Ins. Co., 130 Cal., 153; 62 Pac., 393, was a suit upon a foreign judgment in personam, and obtained in the state of Alabama. The Supreme Court of California held that the defendant was entitled to show that it had ceased doing business in Alabama, and had no agent there at the time of the pretended service, default and judgment.

De Castro vs. Telephone Co., 76 Fed., 425, merely recognizes and enforces the doctrine of this court in Goldey vs. Morning News, 156 U. S., 518. Judge Lacomb very tersely held that:

> "Since it appear that for some time prior to the service of the summons, defendant had ceased to do business in this state, and had no property within this jurisdiction, it could not properly be found here for purposes of service."

On motion for reargument, he held that whether the defendant company had property was not material, since no effort was made to acquire jurisdiction of the defendant through its property by attachment or similar proceedings.

Guthrie vs. Indemnity Co., 101 Tenn., 673; 49 S. W., 829, was a judgment in personam reversed on direct appeal. The application of the Statute of Limitations to the cause of action was the principal point in the case. We have no quarrel, however, with any part of the opinion. To secure personal judgments against them they "should be found doing business in the state with persons or concerning property, however slight." We may treat the Walsh judgment as strictly in personam upon the authority of this Tennessee case, which, in turn, is well supported by the opinion of this court in Goldey vs. Morning News, 156 U. S., 518:

> "A judgment rendered in the court of another state against a corporation neither incorporated nor doing business within the state must be regarded as of no validity in the courts of another state or of the United States *unless service of process was made in the first state upon an agent appointed to act there for the corporation*, and not merely upon an officer or agent residing in another state and only casually within the state, and not charged with any business of the corporation there."

This case is authority for our contention that where summons is served upon an agent designated as required by the statute as a person upon whom process may be served, such service brings the corporation within the jurisdiction of the court, so far, at least, as may be necessary to make its judgments

conclusive upon property which is the subject of the action.

Hazeltine vs. Insurance Co., 55 Fed., 743, was a suit brought upon and to enforce a judgment in personam theretofore obtained in the courts of the state of Maine. The company having ceased to do business, and having withdrawn its agents when the suit was brought, the judgment was held open to collateral attack. The fundamental distinction between the cases relied upon by plaintiff in error and the one at bar is, that, with the exception of Hart vs. Sansom, the service was challenged in the case itself, by motion or other appropriate proceeding, or the suits were founded on foreign judgments in personam sought to be enforced and made effective in other jurisdictions. The defendant in error has here claimed, and is claiming, nothing against the plaintiff in error beyond the application of the judgments to the premises involved. The plaintiff in error, regarding the judgment as one strictly in personam, assumes it to be an absolute nullity, and upon such premises seeks to demolish the title of defendant in error in a collateral proceeding. It is quite evident that the judgment must be a nullity to justify its argument. It can not be a nullity, whatever else may be said of it, if the court had jurisdiction of the res, and was empowered by statute to determine and settle the title.

But counsel insist that the record must affirmatively disclose that the company was doing business in the state at the time of suit brought, or it was not amenable to service of process at all. If that be true, process by publication would be worthless, since the affidavit upon which it must be based would neces-

surily allege, in substance at least, that the corporation was not doing business in the state; and we have seen that under the federal authorities the requirement of doing business is not essential where the purpose of the proceeding is to reach, dispose of, or affect property within the jurisdiction.

On the other hand, no authority cited has adjudged that the record must expressly recite somewhere within its bounds that the company was doing business at the time of suit brought. If that fact can be gathered from the four corners of the record, its direct recital is dispensed with. Both the petition and the decree in the Walsh case allege that the defendant company was organized to do business in the county of Ouray, in the state of Colorado; that it afterwards designated J. M. Jardine, under the laws of Colorado, as its authorized agent, upon whom process might be served; that suits in attachment were begun against it in April and May, 1895, and writs of attachment were levied upon the property in controversy, and summons and writ duly served upon the defendant company by delivering the same to the said Jardine; that judgments were duly rendered in said causes, special execution issued and the property sold, for which the deeds of the plaintiff therefor were duly executed to the holder of the certificate of purchase, and that defendant pretended and claimed that it still held some interest in the premises adverse to the plaintiff. These recitals collectively establish the fact that the company was in the state as a corporation to the extent that the court acquired jurisdiction of it for the purposes of the action and decree through the service of summons upon its duly authorized agent.

Indeed, we may safely affirm that, if the defendant in error or the plaintiffs in the attachment suits, or both, had endeavored to secure service of process by affidavit and publication, instead of delivering the writs to Jardine, the plaintiff in error would be here contending against the validity of such service because of its presence in the state, through its designated agent, upon whom the process should have been served. We have patiently examined every case cited by counsel, and every other authority known to us bearing upon the subject, and we confidently affirm that the courts have never decided against the validity of such a service of process in an action brought, as the Walsh case was, to confirm the title of the plaintiff against some alleged adverse claim of a foreign corporation. We assert that the decree quieting title, and the record supporting it, show jurisdiction of the person and of the property. It is valid, whether considered as a decree in personam or in rem, or both, and proof against either direct or collateral attack.

Indeed, counsel are forced to admit that their reliance is, after all, upon the case of Hart vs. Sansom, notwithstanding the very comprehensive limitation of the authority of that case, as outlined in Arndt vs. Griggs.

FORM OF DECREE.

It remains to notice the contention that the District Court of Ouray county attempted, by the mere force of its decree, to establish a title in Walsh without compelling a deed to be executed by or on behalf of the Cosmopolitan Company. If the court had found

that the Cosmopolitan Company possessed any title or claim of title whatever, the quieting of which was essential to the relation admitted, it should have provided for the execution of its decree by the making of a conveyance in accordance therewith, as required by the provisions of section 2535, Mills' Annotated Statutes; but, unfortunately for plaintiff in error, its finding was that the plaintiff is in the actual peaceable possession of the above described premises, is the owner in fee thereof, and is engaged in working and developing the mining claims aforesaid, and expending thereon large sums of money for the purpose of proving and establishing their value, and that the pretended claim of The Cosmopolitan Mining Company is wholly without right or justification in law, and that the plaintiff is the owner in possession, and entitled to the quiet and peaceable possession of said claims, and each of them. We submit that the decree is conclusive of the plaintiff's title, and of the fact that the defendant has none. The law never recognizes the performance of a needless task, and, if the defendant had no title, it is difficult to perceive what office could be performed by a conveyance to Walsh by it or on its behalf.

The subject is discussed by Mr. Pomeroy, Equity Jurisprudence, volume 1, sections 134, 135 and 170, and the distinction between decrees requiring subsequent positive action for their enforcement, and those which operate *ex proprio vigore* is clearly drawn. This author says that:

> "It is a complete confounding of the essential fact with the external form, to say

that such a mere method of procedure, adopted solely from considerations of policy, determines the nature of the equitable jurisdiction, and demonstrates the non-existence of any equitable primary rights, estates and interests. If there had been any necessary connection between the proceedings and remedies of chancery and this mode of enforcing its decrees *in personam*, if it had been intrinsically impossible to render these decrees operative *in rem*, then the argument would have had some weight; but, in fact, there is no such connection, no such impossibility; the decrees of a court of equity may be made to operate *in rem* to the same extent, and in the same manner as judgments at law. Furthermore, whatever plausibility there might be in the theory as applied to the English court of chancery has been entirely destroyed by the legislation of this country. The statutes of the several states have virtually abolished the ancient doctrine that the decrees in equity can only act upon the person of a party, and have generally provided that in all cases where the ends of justice require such an effect, and where it is possible, a decree shall either operate *ex proprio vigore*, to create, transfer, or vest the intended right, title, estate, or interest, or else that the acts required to be done in order to accomplish the object of the decree shall be performed by an officer of the court

acting for and in the name of the party against whom the adjudication is made."

See, also,

3 Pomeroy, Equity Jurisprudence, section 1317.

In many instances clouds upon title, or adverse claims to property, are of such a character as to require for their settlement a conveyance from the defeated to the successful party. In others, the legal title may be vested in the defeated party, but should be conveyed to the successful one for his complete and adequate relief. In such instances, the decree can not, in the absence of an express statute, become self-executing, and must be followed by a conveyance by, or for, the person decreed to make it to the person decreed to receive it; but, where the decree is confirmatory only, and followed by an express declaration that the defendant has no title whatever, the requirement that the defendant should make a conveyance to the complainant would resolve itself into an absurdity.

In Root vs. Woolworth, 150 U. S., 401, it is declared that a decree which establishes title in complainant carries with it a right of possession as effectually as if it made specific provision to that effect.

Where defendant's grantor alleged that a trust deed from plaintiff's grantor was contrived and made to defraud creditors, a finding to that effect, and a judgment declaring the deed null and void, confirmed

the title of defendant's grantor as a purchaser at the execution sale without any decree to that effect.

Macklin vs. Schmidt, 104 Mo., 361; 16 S. W., 241.

A. obtained a decree in chancery
"that the title to the slave G. be vested in complainant on the 9th day of July, or at any time thereafter, by his paying to B., $130, the amount of B.'s lien on the said slave."

Held, that said decree vested the legal title to the slave in A.

Banks vs. Wilks, 20 Tenn., 279.

The object of the Walsh suit was to secure an adjudication upon the defendant's adverse claim. The decree forever disposed of it by declaring it to be entirely without foundation. Such a decree can establish no title, and, therefore, can require no conveyance.

But, in any event, the alleged defect in the decree can not be availed of by the plaintiff in this proceeding. If the court had no jurisdiction of the parties or the premises the most perfect decree would be a nullity. If it had such jurisdiction an imperfect or incomplete one would be good against collateral attack. If aggrieved by a defective adjudication, the plaintiff's remedy is by direct proceeding in the court which made it.

REJECTION OF EVIDENCE.

Counsel's complaint that plaintiff was not permitted "to prove that it was not doing business in the

state of Colorado except by having a statutory agency, or, in other words, that the authority of the statutory agent had not been revoked of record at the time service was made upon Jardine in the case of Walsh vs. Cosmopolitan Company," is not entirely clear. The defendant not only asserted, but proved, there had been no such revocation, and contended for the continuation of the agency until such revocation. No evidence on the subject pro or con was offered by the plaintiff.

The question asked the witness Story, to which defendants' objection was sustained, was: "Will you please state at that time whether there were any other agents of the Cosmopolitan Company in the county of Ouray, than John M. Jardine?" Mr. Preston then offered to prove by the witness (page 99) that at the time of the service of summons in the Walsh case the corporation had no visible office in Ouray county; that it had no agents upon whom process could be served, and *that it was not engaged in the manual carrying on of the mining business at that time.* The court then inquired if he offered to prove that it had no agent upon whom process might be served, whereupon Mr. Preston said: "I do not make it that broad —any other than John M. Jardine, the alleged statutory agent." The court properly excluded the offer.

Counsel then withdrew his offer and (folio 168) made a more comprehensive one, objection to which was overruled. He then attempted to support it by specific inquiries and wholly failed to do so. Hence the error assigned as to this branch of the case fails completely.

Apart from the fact that the offer virtually conceded the statutory agency of Jardine, a proof that

the corporation was not at the time employed in the *manual* business of *mining* was wholly irrelevant. The business of mining is by no means confined to manual labor. The company was organized to buy, sell, lease, own, improve and work mines. Some of these things would require manual operations and some would not.

Plaintiff's right to dispute the return of the officer might be recognized, but the proof offered did not so much as dispute it by implication. No evidence tending to dispute or contradict it at all was offered.

In conclusion, we respectfully submit that the judgments of the County Court of Ouray county, through which defendant derives his title, and the decree of the District Court of Ouray county confirming it, are valid. The courts rendering them had jurisdiction at all times of the person of the plaintiff in error and of the property in controversy, either of which suffices to shield their proceedings from collateral attack, however directed.

The plaintiff in error is in no legal sense aggrieved. It knew of the pendency of the attachment proceedings through the service of process and from the recitals of the public record of Ouray county. It knew of the judgments thereafter rendered, and settled that of Golden before the prorating order of the court was made. (Transcript, page 74.) The Colorado statutes gave it a year from the entry thereof to vacate the judgments and file its answers to the merits of the actions, but it neglected to avail itself of the privilege. It had the right of redemption from the execution sales for six months thereafter, but permitted the time to lapse without action. It declined to defend the suit for confirmation of title subse-

quently brought by Mr. Walsh, the sheriff's grantee, and a stranger to the attachment suits, and permitted default and decree to be entered against it. More than four years afterward, during which time defendant enjoyed peaceable possession of the mines, expended money on their development, and paid the taxes assessed against them, plaintiff brings this action in ejectment for their recovery, denies the jurisdiction of state courts over its person or its property, repudiates their judgments and decrees, invokes the protection of the fourteenth amendment, and demands the recognition of its title and right of possession to our property. To grant its prayer for relief would be to nullify the solemn adjudications of our courts of record and their lawful execution, to overturn the established doctrines of this tribunal, to deprive defendant of his property acquired by purchase in good faith under process of law, and to unsettle titles to real property throughout the land. The defendant submits the case with confidence in the integrity of his rights, and in full reliance upon the protection of the laws as heretofore expounded and enforced by this Honorable court.

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APPENDIX.

The subjoined extracts from the Constitution, Annotated Statutes and Code of Procedure of the State of Colorado are believed to embrace all of our written laws relating to the controversy, and are hereto appended for the convenience of the court.

CONSTITUTION OF COLORADO—ARTICLE VI.

395. "COURT OF RECORD — JURISDICTION—LIMIT.) Section 23. County Courts shall be courts of record, and shall have original jurisdiction in all matters of probate, settlement of estates of deceased persons, appointment of guardians, conservators and administrators, and settlement of their accounts, and such other civil and criminal jurisdiction as may be conferred by law; Provided, such courts shall not have jurisdiction in any case where the debt, damage, or claim, or value of property involved, shall exceed two thousand dollars, except in cases relating to the estates of deceased persons.

APPEALS — WRITS OF ERROR.) Appeals may be taken from County to District Courts, or to the Supreme Court, in such cases and in such manner as may be prescribed by law. Writs of error shall lie from the Supreme Court to every final judgment of the County Court. No appeal shall lie to the District Court from any judgment given upon an appeal from a justice of the peace."

500. "FOREIGN CORPORATIONS—PLACE —AGENT.) Section 10. No foreign corporation

shall do any business in this state without having one or more known places of business and an authorized agent or agents in the same, upon whom process may be served."

MILLS' ANNOTATED STATUTES.

6. Foreign Corporations.

499. "FOREIGN CORPORATION—RECORD—LIABILITY—REAL ESTATE—MORTGAGE.) Foreign corporations shall, before they are authorized or permitted to do any business in this state, make and file a certificate signed by the president and secretary of such corporation, duly acknowledged with the secretary of state, and in the office of the recorder of deeds of the county in which such business is carried on, designating the principal place where the business of such corporation shall be carried on in this state, and an authorized agent or agents in this state, residing at its principal place of business, upon whom process may be served; and such corporations shall be subjected to all the liabilities, restrictions and duties which are or may be imposed upon corporations of like character, organized under the general laws of this state, and shall have no other or greater powers. And no foreign or domestic corporation, established or maintained in any way for pecuniary profit of its stockholders or members, shall purchase or hold real estate in this state, except as provided for in this act; and no corporation doing business in this state, incorporated under the laws of any other state, shall be permitted to mortgage, pledge

or otherwise incumber its real or personal property situated in this state, to the injury or exclusion of any citizen, citizens or corporations of this state who are creditors of such foreign corporation, and no mortgage by any foreign corporation, except railroad and telegraph companies, given to secure any debt created in any other state, shall take effect as against any citizen or corporation of this state, until all its liabilities due to any person or corporation in this state, at the time of recording such mortgage, have been paid and extinguished."

500. "FOREIGN CORPORATIONS — FILE COPY OF CHARTER.) Every company incorporated under the laws of any foreign state or kingdom, or of any state or territory of the United States, beyond the limits of this state, and now or hereafter doing business within this state, shall file, in the office of the secretary of state, a copy of their charter of incorporation; or in case such company is incorporated by certificate under any general incorporation law, a copy of such certificate and of such general incorporation law duly certified and authenticated by the proper authority of such foreign state, kingdom or territory."

503. "MAY SUE AND BE SUED AS NATURAL PERSONS.) Suits may be instituted and prosecuted by and against any corporation formed or recognized (organized) under this act, in the same manner and in like cases as natural persons."

506. "IN SUITS, PROCESS HOW SERVED ON CORPORATION—WHERE SUIT BROUGHT.) In suits against any corporation, summons shall be served in that county where the principal office of the

corporation is kept or its principal business carried on, by delivering a copy to the president thereof, if he may be found in said county, but if he is absent therefrom, then the summons shall be served in like manner in such county, on either the vice-president, secretary, treasurer, cashier, general agent, general superintendent or stockholder of said corporation, within such time and under such rules as are provided by law for the service of such process in suits against real persons, and if no such person can be found in the county where the principal office of the corporation is kept, or in the county where its principal business is carried on, to serve such process upon, a summons may issue from either one of such counties, directed to the sheriff of any county in this state where any such person may be found, and served with process. If such corporation keeps no principal office in any county, and there is no county in which the principal business of such corporation is carried on, then suit may be brought against it in any county where the above-mentioned officers, or any or either of them, may be found. Provided, That the plaintiff may, in all cases, bring his action in the county where the cause of action accrued."

DIVISION III, COUNTY COURTS.

1. Civil Business.

1054. JURISDICTION. $2,000. Estates Excepted.) The County Courts of the several counties of this state shall hereafter have concurrent jurisdiction with the District Courts in all civil actions, suits

and proceedings whatsoever, where the debt, damage or claim, or the value of the property involved, shall not exceed two thousand (2,000) dollars, except as otherwise provided in this act; Provided, however, That the limit of jurisdiction above named shall not apply in causes relating to the estates of deceased persons.

MILLS' ANNOTATED CODE.

25. "PLACE OF TRIAL OF CIVIL ACTIONS.

Except when otherwise provided, actions for the following causes shall be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial as provided in this act.

RECOVERY OF REAL PROPERTY.

First—For the recovery of real property, or of any interest therein, or for the determination of any form of such right or interest, and for injuries to real property.

PARTITION.

Second—For the partition of real property.

FORECLOSURE.

Third—For the foreclosure of a mortgage of real property; Provided, That where such real property is situated partly in one county and partly in another, the plaintiff shall bring his action in the county where the greater portion of such real estate is situate, and

the county so selected shall be the proper county for the trial of any or all such actions as are mentioned in this section."

26. "ACTIONS FOR STATUTORY PENALTY AND AGAINST PUBLIC OFFICERS—WHERE TO BE TRIED—POWER OF COURT TO CHANGE VENUE.

Actions for the following causes shall be tried in the county where the cause, or some part thereof, arose, subject to the like power of the court to change the place of trial:

First—For the recovery of a penalty of forfeiture imposed by statute, except that when it is imposed for an offense committed on a lake, river or other stream of water situated in two or more counties, the action may be brought in any county bordering on such lake, river or stream, and opposite to the place where the offense was committed.

Second—Against a public officer or person especially appointed to execute his duties, for an act done by him in virtue of his office, or against a person who, by his command, or in his aid, does anything touching the duties of such officer, or for a failure to perform any act or duty which he is by law required to perform."

27. "OTHER ACTIONS—WHERE TRIED—NON-RESIDENTS—DEPARTING FROM THE STATE—CONTRACTS—TORTS.

In all other cases the actions shall be tried in the county in which the defendants, or any of them, may reside at the commencement of the action, or in the

county where the plaintiff resides when service is made on the defendant in such county; or, if the defendant be a non-resident of this state, the same may be tried in any county in which the defendant may be found in this state, or in the county designated in the complaint, and if any defendant or defendants are about to depart from the state, such action may be tried in any county where plaintiff resides, or where defendant may be found and service had. Actions on book accounts or for goods sold and delivered, may be tried in the county where the plaintiff resides, or in the county where the goods were sold. Actions upon contracts may be tried in the county in which the contract was to be performed; actions upon notes or bills of exchange, in the county where the same are made payable; and actions for torts, in the county where the tort was committed, subject, however, to the power of the court to change the place of trial as provided in this act."

29. "CHANGE OF VENUE—CAUSES.

The court may, on good cause shown, change the place of trial in the following cases:

First—When the county designated in the complaint is not the proper county.

Second—When there is reason to believe that an impartial trial can not be had therein.

Third—When the conveniences of witnesses and the ends of justice would be promoted by the change.

Fourth—When from any cause the judge is disqualified to try the action; Provided, The court shall not change the place of trial for the disqualification of the district judge in any case where a competent

judge of another District Court will appear and try the action, or where the parties to the action agree upon an attorney to preside at the trial of such action."

32. "ACTIONS—HOW COMMENCED—SUMMONS—COMPLAINT—DISMISSAL WITHOUT NOTICE—ATTORNEY'S FEE.

Civil actions shall be commenced by the filing of a complaint with the clerk of the court in which the action is brought, or by the service of a summons.

The complaint must be filed within ten days after the summons is issued, or the action may be dismissed without notice, and in such case the court may, in its discretion, if it shall be of the opinion that the action was vexatiously commenced, tax a reasonable attorney's fee as costs in favor of the defendant, to be recovered of plaintiff or his attorney."

33. "SUMMONS WITHIN MONTH—HOW SIGNED, SEALED, DIRECTED.

The clerk shall endorse on the complaint the day, month and year the same is filed, and at any time within one month after the filing of the same, the plaintiff may have a summons issued. The summons may be signed by the clerk and directed to the defendant, to be issued under the seal of the court, or it may be signed and issued by the attorney for the plaintiff."

34. "DEFENDANT TO APPEAR AND ANSWER IN 20 DAYS—30 DAYS—10 DAYS ADDITIONAL—STATE MONEY OR OTHER RELIEF DEMANDED—VOID ONLY WHEN MISLEADING—FORM OF SUMMONS SAME IN ALL CASES.

The summons shall state the parties to the action, the state, county and court in which it is brought, and require the defendant to appear and answer the complaint within twenty days after the service of the summons, if served in the county in which the action is brought; or if served out of such county, or by publication, within thirty days after the service of the summons, exclusive of the day of service, or that judgment by default will be taken against him according to the prayer of the complaint, and shall briefly state the sum of money or other relief demanded in the action; but the summons shall not be considered void or erroneous on account of an insufficient statement of the relief demanded, unless the same is manifestly misleading. If a copy of the complaint be not served with the summons, or if the service be made out of the state, ten days additional to the time specified in the summons shall be allowed for appearance and answer, but the form of the summons shall be the same in all cases."

35. "FORM OF SUMMONS WITH COMPLAINT—SAME TO BE VARIED WHEN.

The summons, where a copy of the complaint is served therewith, may be in substance as follows, appropriately filling the several blanks, viz.:

State of Colorado,

ss.

———— County,

In the ———— Court.

————————, Plaintiff,

vs. Summons.

————————, Defendant.

The People of the State of Colorado.

To the defendant above named, Greeting:

You are hereby required to appear in an action brought against you by the above named plaintiff, in the ———— Court of ———————— county, state of Colorado, and answer the complaint therein within twenty days after the service hereof, if served within this county, or if served out of this county, or by publication, within forty days after the service hereof, exclusive of the day of service; or judgment by default will be taken against you according to the prayer of the complaint.

Given under my hand ———————— this ———— day of ————, A. D. ————.

————————————.

Where a copy of the complaint is not served with the summons, or service is had by publication, the above form shall be varied to meet the requirements of the case, as provided for in the preceding section."

37. "SUMMONS—BY WHOM SERVED—RETURN.

The summons shall be served by the sheriff of the county where the defendant is found, or by his deputy,

or by any person not a party to the action. When the summons is served by the sheriff, or his deputy, it shall be returned, with the certificate of the officer of its service, to the clerk or attorney who issued the same. When the summons is served by any other person, it shall be returned as before provided, with the affidavit of such person of its service."

38. "SUMMONS—HOW SERVED.

A summons shall be served as follows:

First—By delivering a copy thereof to each defendant named therein; or,

Second—By leaving a copy of the writ at the usual place of abode of each defendant named therein, with some member of the family in which he resides, who is over the age of fifteen years; or,

Third—At the usual place of business of the defendant, to be served (if he have one) with his clerk or bookkeeper thereat.

MUNICIPAL CORPORATION.

Fourth—If the action be against a municipal corporation, by delivering a copy of the summons to the mayor or clerk of such corporation.

COUNTY.

Fifth—If the action be against the county, by delivering a copy of the summons to the county clerk of such county.

SCHOOL DISTRICT.

Sixth—If the action be against a school district, by delivering a copy of the summons to the clerk or one of the directors of such school district.

PRIVATE CORPORATION.

Seventh—If the action be against a private corporation, by delivering a copy of the summons to the president or other chief officer of such corporation, or to the secretary, treasurer, cashier or other general agent thereof; but if no such officer of the corporation can be found in the county in which the action is brought, then service may be made by delivering a copy of the summons to any stockholder of such corporation who may be found in such county.

RAILROAD COMPANY.

Eighth—If the action be against a railroad company, whether organized under the laws of this state or of any other state or territory, and whether the charter prescribes the manner or place of the service of process on such company, the summons may be served by delivering a copy thereof to the president or vice-president, or secretary, or treasurer, or cashier of such company; Provided, That if no such officer be found in the county in which the action is brought, service of summons may be made by delivering a copy thereof to any regular or acting ticket agent of such company, having his office in the county in which the action is brought.

FOREIGN CORPORATION OR JOINT STOCK COMPANY.

Ninth—If the action be against a foreign corporation or joint stock company or association, organized under the laws of another state or territory, and doing business within this state, the summons shall be served by delivering a copy to any agent of such cor-

poration, company or association found in the county in which the action is brought. If no such agent be found in such county, then by delivering a copy of the summons to any stockholder who may be found in such county.

MINOR.

Tenth—If suit be brought against a minor under the age of fifteen years, the summons shall be served by delivering a copy of the writ to him personally, also a copy to his or her father, mother or guardian; or, if there be none such in the state, then by delivering a copy to any person having care or control of such minor, or with whom he or she resides, or in whose service he or she is employed.

LUNATICS.

Eleventh—If the action be against a person judicially declared to be incapable of conducting his or her own affairs, and for whom a guadian has been appointed, under the provisions of chapter LXIX of General Statutes, entitled 'lunatics,' summons shall be served by delivering a copy of the writ to such guardian."

38a. "ACT LIBERALLY CONSTRUED—SUMMONS NOT QUASHED FOR TECHNICAL ERROR.

This act shall be liberally construed, and no service of summons shall be set aside or quashed for any technical error, defect or omission, either in the summons or in the service of the summons, which error, defect or omission does not affect some substan-

tial right of the defendant or defendants therewith served."

38b. "REPEAL—SAVING CLAUSE.

All acts or parts of acts inconsistent with the provisions of this act are hereby repealed; but nothing herein contained shall be held to repeal any provision of law, now in force, which authorizes or permits a summons to be served in any other county of the state, than that in which the action is brought."

39. "SUMMONS IN DIFFERENT COUNTIES—ALIAS—PLURIES.

When there are several defendants residing in different counties, a separate summons may be issued to each county, for the service of the defendants residing therein, an alias or pluries summons may be issued and served in like manner as the original at any time."

41. "SERVICE BY PUBLICATION—WHEN ALLOWED—PROCEDURE.

Service by publication shall be allowed only after summons issued and return thereon made, that the defendant, after diligent search, can not be found. After such return, not less than ten days after issue of summons, publication shall be made by order of the clerk of the proper court, but shall be made only in cases of attachment, foreclosure, claims and delivery, and other proceedings where specific property is to be affected, or the procedure is such as is known as a proceeding in rem. After return is made as aforesaid, the case being such as hereinbefore mentioned, the plaintiff or one of the plaintiffs may file,

in the office of the proper clerk, an affidavit stating that the defendant resides out of the state, or has departed from the state without intention of returning, or concealed himself to avoid the service of process and giving his postoffice address, if known, or stating his postoffice address is not known to affiant, whereupon the order of publication shall be made by the clerk. The order shall direct the publication to be made in a public newspaper published in the county. Such publication shall be made at least once a week for four successive weeks. When the affidavit gives the postoffice address of the defendant, the clerk shall mail a copy of the summons, duly stamped, to the defendant, at such address forthwith. The service shall be complete at the expiration of ten days from the date of the last publication. When no newspaper is published within the county, the clerk shall designate a newspaper published in some adjoining county; Provided, That if the plaintiff does not reside in the state or is absent from the state, the affidavit for service by publication may be made by the plaintiff's attorney in the action."

44. "WHEN COURT DEEMED TO ACQUIRE JURISDICTION — VOLUNTARY APPEARANCE —SERVICE UPON UNKNOWN PARTIES.

From the time of the filing of the complaint, or the service of the summons in a civil action, the court shall be deemed to have acquired jurisdiction, and to have control of all subsequent proceedings. A voluntary appearance of a defendant shall be equivalent to personal service of the summons upon him. If any plaintiff shall allege that there are, or that he

verily believes that there are, persons interested in the subject-matter of the complaint, whose names he can not insert therein, because they are unknown to him, and shall describe the interest of such persons, and how derived so far as his knowledge extends, the court, or the judge thereof in vacation, shall make an order as in case of non-residents for publication of the summons, reciting, moreover, the substance of the allegations of the complaint in relation to the interest of such unknown parties, and after the completion of service by such publication, the court shall have jurisdiction of such person, and any judgment or decree rendered in the action. The action shall apply to and conclude such persons with respect to such intent in the subject-matter of the action."

92. "AFFIDAVIT—CAUSES OF ATTACHMENT.

No writ of attachment shall issue unless the plaintiff, his agent or attorney, or some credible person for him, shall file in the office of the clerk of the court in which the action is brought, an affidavit setting forth that the defendant is indebted to such plaintiff, stating the nature and amount of such indebtedness as near as may be, and alleging any one or more of the following causes for attachment, viz.:

NON-RESIDENTS.

First—That the defendant is not a resident of this state.

FOREIGN CORPORATIONS.

Second—That the defendant is a foreign corporation.

OFFICE OUT OF STATE.

Third—That the defendant is a corporation whose chief office or place of business is out of the state.

DEFENDANT CONCEALS HIMSELF—ABSENCE.

Fourth—That the defendant conceals himself, or stands in defiance of an officer, so that the process of law can not be served upon him, or that the defendant has for more than four months been absent from the state, or that for such length of time his whereabouts have been unknown, and that the indebtedness mentioned in the affidavit has been due during all of said period.

REMOVAL OF GOODS.

Fifth—That the defendant is about to remove his property or effects, or material part thereof, out of this state, with intent to defraud, or hinder, or delay his creditors, or some one or more of them.

TRANSFERRING PROPERTY.

Sixth—That the defendant has fraudulently conveyed or transferred or assigned his property or effects, so as to hinder or delay his creditors, or some one or more of them.

CONCEALMENT, REMOVAL, DISPOSAL OF GOODS.

Seventh—That the defendant has fraudulently concealed or removed, or disposed of his property or effects, so as to hinder or delay his creditors, or some one or more of them.

ABOUT TO CONVEY OR ASSIGN.

Eighth—That the defendant is about to fraudulently convey, or transfer, or assign his property or effects, so as to hinder or delay his creditors, or some one or more of them.

ABOUT TO CONCEAL OR DISPOSE OF—ABOUT TO DEPART.

Ninth—That the defendant is about to fraudulently conceal, or remove, or dispose of his property or effects, so as to hinder or delay his creditors; or that such debtor has departed, or is about to depart from this state with the intention of having his effects removed from the state.

FAILURE TO PAY ON DELIVERY.

Tenth—That the defendant has failed or refused to pay the price or value of any article or thing delivered to him, which he should have paid for upon the delivery thereof.

FAILURE TO PAY FOR WORK OR SERVICES.

Eleventh—That the defendant has failed or refused to pay the price or value of any work or labor done or performed, or for any services rendered by the plaintiff at the instance of the defendant, and which should have been paid at the completion of such work, or when such services were fully rendered.

DEBT FRAUDULENTLY CONTRACTED—FALSE PRETENSES.

Twelfth—That the defendant fraudulently contracted the debt, or fraudulently incurred the liabil-

ity respecting which the suit is brought, or by false representations, or false pretenses, or by any fraudulent conduct, procured money or property of the plaintiff."

92e. "SUIT BEGUN IN COUNTY COURT—AMOUNT EXCEED TWO THOUSAND DOLLARS—TRANSFER PAPERS TO DISTRICT COURT—JOINT ISSUES—PROOF BEFORE JUDGMENT IS RENDERED.

Whenever the original suit in which a writ of attachment shall be issued and served, shall be begun in the County Court of any county in this state, and the claim of any intervenor or attaching creditor therein, as hereinbefore provided, shall exceed the sum of two thousand dollars, exclusive of costs, it shall be the duty of such court to forthwith certify such case and transmit all papers issued or filed therein, to the District Court of such county, and thereafter the case shall proceed in the same manner as if it had been originally begun in such District Court. In all cases in which issues shall be joined upon the several complaints or affidavits in attachment, separate trials shall be had unless otherwise ordered by the court; but in default of an issue therein, each creditor shall make proof of his claim to the satisfaction of the court before judgment shall be rendered therein."

97. "WRIT TO DIFFERENT COUNTIES—CONTENTS—ALIAS WRITS WHEN SHERIFF TO TAKE SECURITY.

The writ shall be directed to the sheriff of any county in which the property of such defendant may

be, and require him to serve a copy of the writ on the defendant and to attach and safely keep all the property of such defendant within his county, not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which shall be stated in conformity with the affidavit, and alias writs may issue at any time, unless the defendant deposit the amount or give him security, by the undertaking of at least two sufficient sureties in an amount sufficient to satisfy such demand, besides costs, or in amount equal to the value of the property which has been or is about to be attached, in which case the sheriff shall take such undertaking. Several writs may be issued at the same time to the sheriffs of different counties."

104. "SHERIFF EXECUTE UNLESS DEFENDANT GIVE BOND.

The sheriff to whom the writ is directed and delivered shall execute the same without delay, and if the undertaking mentioned in this chapter be not given by the defendant, then as follows:

REAL PROPERTY—HOW ATTACHED.

First—Real property standing upon the records of the county in the name of the defendant shall be attached by filing a copy of the writ, together with a description of the property attached, with the recorder of the county.

PROPERTY HELD IN NAME OF OTHER PERSON.

Second—Real property, or any interest therein, belonging to the defendant and held by any person,

or standing upon the records of the county in the name of any other person (but belonging to the defendant), shall be attached by leaving with such person, or his agent, a copy of the writ and a notice that such real property (giving a description thereof), and any interest therein belonging to the defendant, are attached pursuant to such writ, and filing a copy of such writ and notice with the recorder of the county.

PERSONAL PROPERTY.

Third—Personal property capable of manual delivery shall be attached by taking it into custody."

108. "JUDGMENT TO BE SATISFIED OUT OF ATTACHED PROPERTY—EXECUTION FOR BALANCE—SALE AND NOTICE AS IN OTHER EXECUTION SALES.

If judgment be recovered by the plaintiff, the sheriff shall satisfy the same out of the property attached by him, which has not been delivered to the defendant or claimed as hereintofore provided, or subject to execution on another judgment recovered previous to the issuing of the attachment, if it be sufficient for that purpose.

First—By paying to the plaintiff the proceeds of all sales of perishable property sold by him, or any debts or credits collected by him, or so much as shall be necessary to satisfy the judgment.

Second—If any balance remain due, and an execution shall have been issued on the judgment, he shall sell, under the execution, so much of the property, real or personal, as may be necessary to satisfy the balance, if enough for that purpose remain in his

hands. Notices of the sales shall be given, and the sales conducted as in other cases of sales on execution."

109. "BALANCE DUE WHEN GENERAL PERSONAL JUDGMENT—HOW COLLECTED—SURPLUS.

If, after selling all the property attached by him remaining in his hands, and applying the proceeds, together with the proceeds of any debts or credits collected by him, deducting his fees, to the payment of the judgment, and any balance shall remain due, the sheriff shall, if there be a general, personal judgment against the defendant, proceed to collect such balance as upon an execution in other cases. Whenever the judgment shall have been paid, the sheriff, upon reasonable demand, shall deliver over to the defendant the attached property remaining in his hands, and any proceeds of the property attached unapplied on the judgment."

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 134.

COSMOPOLITAN MINING COMPANY,
PLAINTIFF IN ERROR,

vs.

THOMAS F. WALSH, DEFENDANT IN ERROR

Error to the Circuit Court of the United States for the District of Colorado.

SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR ON ISSUE OF JURISDICTION.

The original brief for the defendant (pages 94-104) discussed the question of jurisdiction under the sub-head, "Fourteenth Amendment." The application of that amendment to the record was distinctly challenged, and the pertinence of the authorities cited by plaintiff in support of its right to review the judgment in this court was denied. The action does not,

we maintain, fall within the purview of section 5 of the act of March 3, 1891. This contention, we believe, is fully supported by the language of the section, and by the logic of the decisions based upon it, and upon the succeeding sections of the statute.

When the plaintiff brought this action it invoked the jurisdiction of the United States Circuit Court solely on the diverse citizenship of the parties. The defendant was alleged to be a citizen of Colorado, and the plaintiff was a corporation and citizen of Maine. In his answer the defendant alleged title to the mines in dispute, through certain execution sales upon judgments in attachment suits, duly brought in the County Court of Ouray county, and by reason of a decree quieting his title as against the plaintiff in an action instituted by him under the statute in the District Court of Ouray county. The plaintiff replied, denying personal service in any of the actions pleaded, averred a conspiracy of bidders at the sheriff's sale, and attacked the regularity of that sale upon other grounds. No assertion of the construction or application of the Constitution was made.

Nine months afterward the plaintiff filed an amended replication whereby it alleged

> "that, by reason of the actions of the said County Court and the sheriff of Ouray county, Colorado, had and done in, and in pursuance of, said several actions and by defendant in said defense particularly mentioned and described, the plaintiff has been, and is being, deprived of its property, viz.: the property sought to be recovered in this action, without notice, hearing, opportunity

> to be heard or due process of law, and in violation of the Fourteenth Amendment to the Constitution of the United States." (Printed Record, page 14.)

When the defendant offered the records of the several judgments pleaded in his answers, the plaintiff, among others, made the objection that, to give effect to them, would be to deprive it of the property in controversy without due process of law, and in contravention of the Constitution. (Transcript, pages 53, 91.)

On August 15, 1901, the trial judge signed a certificate which was incorporated into the record which was entitled of the court and cause, reciting that,

> "I, John A. Marshall, United States district judge for the district of Utah, assigned to hold the Circuit Court of the United States for the district of Colorado, before whom the above entitled action was tried, do hereby certify that, in the pleadings in this action, as well as in the rulings of this court in admitting and refusing to admit evidence, and in giving, and refusing to give, instructions to the jury as set forth in the assignment of errors hereto annexed, there were involved the application and construction of the Constitution of the United States, viz.: of that part of the Fourteenth Amendment to the same which provides for due process of law." (Transcript, page 19.)

These recitals indicate the manner in which the application of the federal Constitution is claimed to be involved in the record.

The certificate made by Judge Marshall, who presided at the trial of the case in the Circuit Court, as set forth in the record, does not and can not establish or support the claim of the plaintiff in error, that this court has jurisdiction of the question, or should review the decision of the Circuit Court:

(a) This case is not one of those in which a certificate is authorized or permitted by the act of March 3, 1891.

The attention of the court has been hitherto directed to the fact that no warrant can be found in the act of 1891 for Judge Marshall's certificate of August 15th. When an appeal is taken under section 5 of that act on the question of jurisdiction of the Circuit Court, that question alone shall be certified for decision to this court from the court below. The certificate in question does not relate to jurisdiction. It could not well do so, since the jurisdiction of the cause by the Circuit Court was not questioned. The certificate does not undertake to present any question or questions of law to this court, concerning which any instruction is desired. If it did, it would be worthless, as the right to do so is bestowed by section 6 of the act upon the Circuit Courts of Appeals alone.

(b) The certificate of Judge Marshall can not establish the existence of such a controversy or state of contention, as would permit the case to be taken for review direct to this court, even if it were one of the class of cases which may be brought to this court upon the record disclosing the necessary questions for that purpose.

In no case, save that in which, as above stated, the certificate of the judge of the Circuit Court authorizes the bringing of the case to this court for review, is the certificate of the court of any effect for that purpose.

The certificate can impart nothing to the record which is not already there. On the other hand, that which the record discloses can neither be limited nor enlarged by the statement of the trial judge. Were the rule otherwise, the recitals of a record might be contradicted by a judicial certificate and jurisdiction given or denied to this court or the Circuit Court of Appeals, as the opinion of the trial judge might determine. Analogous to this certificate are those which, under the judiciary act bringing certain judgments of state courts of last resort under the review of this court, are sometimes attached by the state justices to the transcripts of the records of such judgments. In Lawler vs. Walker, 14 Howard, 149, this court, referring to such a certificate, said:

> "The conflict of a state law with the Constitution of the United States, and a decision by a state court in favor of its validity, must appear on the face of the record before it can be re-examined in this court. * * * This certificate is that the Supreme Court of Ohio held that certain statutes of Ohio were valid, which had been alleged to be in violation of the Constitution of the United States, without naming what those statutes were. This is neither within the letter nor spirit of the act. If permitted, it would make the state courts judges of the

> jurisdiction of this court, and might cause them to take jurisdiction in cases in which conflicts between the state laws and the Constitution and the laws of the United States did not exist."

In Parmelee vs. Lawrence, 11 Wall., 38, it was said that:

> "If this court should entertain jurisdiction upon a certificate alone, in the absence of any evidence of the question of the record, then the Supreme Court of the state can give jurisdiction in every case when the question is made by counsel in argument."
>
> "We have repeatedly held that such certificate is insufficient to give us jurisdiction when it does not appear in the record."
>
> Yazoo Company vs. Adams, 180 U. S., 48.

The certificate of Judge Marshall at most could only affirm something disclosed by the record. It could add nothing to its efficacy for jurisdictional purposes.

From the record, therefore, the right to this writ must be derived. Does it present a case directly reviewable by this court? This, as we are advised, is the sole proposition upon which further discussion is desired.

Warrant for the writ of error herein must be found in section 5, 26 U. S. Statutes, 827, as amended, 29 U. S. Statutes, 495, which, for convenience, is here quoted in full:

> "That appeals or writs of error may be taken from the District Courts, or from the existing Circuit Courts, direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision. From the final sentences and decrees in prize causes. In cases of conviction of a capital crime. *In any case that involves the construction or application of the Constitution of the United States.* In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question. *In any case in which the Constitution or law of a state is claimed to be in contravention of the Constitution of the United States.*"

It is obvious that the plantiff's right to the writ of error from this court must be founded upon that clause of the above section which refers to the construction or application of the Constitution of the United States. Counsel do not pretend to find warrant for it elsewhere They say, page 14, that the case

> "was brought here under that clause of section 5, 26 U. S. Statutes, 828, which provides that where the construction or application of the federal Constitution is involved an appeal or writ of error may be taken to this court from the Circuit Courts. We submit

> that the application of a portion of the Fourteenth Amendment to the Constitution of the United States, which provides that no person shall be deprived of his property without due process of law, is involved in the case at bar, and that the determination of this question was necessary to a decision of the case in the court below, and is necessary here."

On the next page of their brief the court is informed that

> "the judgments of the County Court of Ouray county are attacked solely upon the ground that they were rendered without due process of law, inasmuch as the court never obtained jurisdiction of the plaintiff in error."

We begin the discussion, therefore, without dispute as to the basis or character of the question.

If the "process of law" clause of the Fourteenth Amendment is involved herein, either by way of construction or application, it is because plaintiff has so averred in its amended replication. There is nothing in the offer, admission or rejection of evidence, that in any manner involves this. The attack upon the judgments of the County Court of Ouray county, as being without due process of law, is grounded solely upon the contention that the court never obtained jurisdiction *of the person of the plaintiff in error.* The attack upon the decree quieting defendant's title is the same. Yet it can not be successfully contended that such jurisdiction is at all necessary

to the regularity of these proceedings if the court had jurisdiction *of the property in controversy*, in harmony with the statutes of the state, making due provision therefor. In other words, *the absence of due process whereby jurisdiction of the person is not secured is of no importance, and therefore, can not be involved in the case, if by due process, jurisdiction of the thing has been secured, and the ensuing judgment has been enforced as to the thing alone.*

Plaintiff also (page 15) admits that the Circuit Court acquired jurisdiction by reason of the diverse citizenship of the parties. It attempts to excuse the absence of the "constitutional question" from the complaint, because it could not know that the defendant in error would rely upon the judgment and the proceedings that present the question. The excuse is absurd.

The records of both the courts and of the recorder of the county were available to the plaintiff. It was by the statute bound to take notice of the latter. The transcript shows that the attachments, the liens, the certificates of sale and the sheriff's deed under the attachment judgments were all recorded, and formed the sole and only basis of the defendant's title to the premises in question. The plaintiff knew this just as well when it began the action as it did nine months after filing its original replication, when it filed its last and amended one. To claim that it could not have alleged the existence of its constitutional question in the body of its complaint because it could not know what the defendant's answer and defense would be, is under all the circumstances to presume most unduly upon the assumed credulity of this court.

The attempted intrusion of the question by an amended pleading months after the case was ready for trial, would indicate that it had not occurred to counsel when the case was brought, nor until after the issues were duly framed, and had no real existence in the case.

The application or construction of some part of the federal Constitution must be in fact involved in a case which comes to this court under section 5 of the act of 1891, and that fact must appear in some other manner than by the mere assertion of a claim. It has been many times decided by this court that the bare averment of a federal question will not give the court jurisdiction.

New Orleans vs. New Orleans Co., 142 U. S., 79.

Millinger vs. Hartupee, 6 Wall., 258.

Hamblin vs. The Western Land Co., 147 U. S., 531.

St. Louis R. W. Co. vs. Missouri, 156 U. S., 483.

Wilson vs. North Carolina, 169 U. S., 595.

Clarke vs. McDade, 165 U. S., 172.

St. Paul R. W. Co. vs. St. Paul Co., 68 Fed., 11; 32 U. S. App., 372.

Northern Pacific Co. vs. Musser Co., 168 U. S., 607.

Brown vs. Colorado, 106 U. S., 95.

Leiper vs. Texas, 139 U. S., 462.

Tuppe vs. R. R. Co., 147 U. S., 126.

"The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor the validity of an authority every time an act done by such authority is disputed."

Cook County vs. Calumet Co., 138 U. S., 635.

Blackburn vs. Portland Co., 175 U. S., 586.

A general statement that the decision of a court is against the constitutional rights of the objecting party or the Fourteenth Amendment, or that it is without due process of law, particularly when these specifications appear only in specifications of error, so called, will not raise a federal question, even where the judgment is a final one, within the section of the Revised Statutes above mentioned. There must be at least some part of a federal question.

Clarke vs. McDade, 165 U. S., 172.

Beals vs. Cone, 188 U. S., 184.

The cases cited were on writs of error to state courts, and, of course, under an entirely different statute, but the general principle covered by them is fully as applicable to cases like the one at bar. Decisions of similar import, arising under sections 5 and 6 of the act of 1891, are in harmony with the proposition that the element conferring jurisdiction must be actual, and not colorable merely.

In World's Columbian Exposition vs. United States, 56 Fed., 654, the appellee moved to dismiss the appeal because the jurisdiction of the court was in

issue, that the case involved a construction and application of the Constitution of the United States, and that the constitutionality of federal laws was drawn in question; hence the appeal to the Circuit Court of Appeals from an interlocutory order could not be maintained under section 7 of the act.

Chief Justice Fuller, in denying the motion, said:

> "We do not understand that the power of the Circuit Court to herein determine the cause was denied, but that appellants contended that the United States had not by their bill made a case properly cognizable in a court of equity. The objection was want of equity, and not want of power. The jurisdiction of the Circuit Court was, therefore, not in issue within the intent and meaning of the act. So far as the construction or application of the Constitution of the United States and the constitutionality of the laws of the United States are concerned, we are of the opinion that the case involved, or there was drawn in question, neither the one nor the other, in the sense that the action of the Circuit Court was invoked to dispose of or proceeded upon the disposition of the contention raised as to either. The ground of the decision had no reference to the construction or application of the Constitution, or the validity of the acts of Congress in respect to that instrument, and the conclusions upon which the order was entered were unaffected by considerations of that character. Cases in

which the construction or application of the Constitution is involved, or the constitutionality of any law of the United States is drawn in question, are cases which present an issue, upon such construction, or application, or constitutionality, the decision of which is controlling; otherwise every case arising under the laws of the United States might be said to involve the construction or application of the Constitution, or the validity of such laws. The jurisdiction of this court to review the order can not be defeated at the instance of appellees, because the constitutionality of the acts upon which they rely might have been challenged by their adversaries."

This decision is in accord with those which determine that when the jurisdiction of a Circuit Court of the United States is invoked, solely on the ground of diverse citizenship, the ground thus invoked is controlling, whether questions of a federal character may present themselves in the progress of the case. In Colorado Central Co. vs. Turck, 150 U. S., 138, a writ of error was sued out from this court to the Circuit Court of Appeals for the Eighth circuit. The case was originally brought in the circuit for the district of Colorado, on the ground of diverse citizenship. It was contended, nevertheless, that the vital issue of the controversy depended upon the construction and application of section 2322, R. S., concerning the apex or dip of lodes or veins, that jurisdiction existed on that ground and did not depend entirely upon that of citizenship. Also, that on the question

of jurisdiction, reference might be had to the entire pleadings, the evidence, or the rulings of the courts below. But the court said that

> "this view ignores the settled doctrine that the inquiry in cases such as this into the jurisdiction of the Circuit Court is limited to the facts appearing in the record in the first instance."

The decision in Metcalf vs. Watertown, 128 U. S., 586, is cited with approval, following which the chief justice says:

> "The jurisdiction of the Circuit Court was invoked December 2, 1885, by the filing of the complaint, from which it appeared that the suit was one of which cognizance could be properly taken on the ground of diverse citizenship, but it did not appear therefrom that jurisdiction was vested or could be asserted on any other ground. The federal question now suggested did not emerge until the defendant set up its second defense, and not then unless deducible from the bare averment that it claimed under the senior discovery and patent, which was admitted in the replication. * * * The jurisdiction had, however, already attached, and could not be affected by the subsequent developments. It depended entirely upon diverse citizenship when the suit was commenced, and to that point of time the inquiry must necessarily be referred. If the

> plaintiff had invoked it on two distinct grounds, one of them being independent of diverse citizenship, a different question might have been presented."

In that case, the alleged federal question was invoked by the defendant, which could not have asserted it prior to the filing of the answer, when it was too late to do so. In the case at bar, the alleged federal question was known or could have been known to the plaintiff before and at the time the complaint was filed. It could have included that with diverse citizenship as an element of jurisdiction, but failed to do so. It did not emerge until the amended replication was tardily filed, and then only as a legal conclusion. The fact that the case cited was error to the Court of Appeals, while the one at bar is error direct to the trial court, should not affect the general proposition.

Borgmeyer vs. Idler, 159 U. S., 408.
Ansbro vs. United States, 159 U. S., 698.
Ex parte Jones, 164 U. S., 691.
Wise vs. Nixon, 78 Fed., 204.
Blackburn vs. Portland G. M. Co., 175 U. S., 570.

The doctrine of these and other authorities bearing on the same subject justify the contention that, although the construction of a federal statute or the application or construction of the Constitution of the United States should be involved in the trial of a cause, or should emerge from the pleadings or otherwise, after its commencement, yet unless the existence

of such question be alleged at the outset as one of the grounds of jurisdiction, the case must go to the Circuit Court of Appeals for review, and the decision of that court is final. It can not, under the act of 1891, come to this court either by writ of error to the trial court, or to the Circuit Court of Appeals.

But we are not obliged to rest our contention upon this point.

The record does not make it appear that the Fourteenth Amendment, its construction or application, was involved in the trial of the case, or was the basis of any right or contention by the plaintiff, or that it was claimed or asserted below that the state had done any of the things prohibited by the Fourteenth Amendment. The record fails to disclose that such question was presented, discussed or decided, and much less that it was a substantial, colorable or controlling consideration in the determination of the issues in the case. We have shown, by the decisions of this court, and the plain language of the act of March 3, 1891, that Judge Marshall's certificate was insufficient, and the allegations contained in the amendment to the replication were wholly futile and unavailing, to create, present or preserve for the consideration of this court, a controversy under the Fourteenth Amendment, which would enable this court for that reason to review the decision of the court below. Such question must *bona fide* exist in the case, and not be there merely formally or by naked assertion or allegation. The state of Colorado passed no law which the plaintiff claimed deprived it of its property without due process of law. If the state court found, as a matter of fact, that an authorized agent was served, this could not be construed to bring the case

within the inhibitions of the Fourteenth Amendment, or to raise a colorable discussion as to the applicability of the amendment thereto. Simply because the plaintiff alleges that it was deprived of its property without due process of law, is wholly unavailing for the purpose of conferring jurisdiction to review upon this court. There is wanting an essential element—a state statute or law authorizing this wrong to be perpetrated, and under the authority of which the wrong in fact, it is claimed, has been accomplished. The complaint, which alleged, as the ground of jurisdiction in the Circuit Court, diverse citizenship of the litigants, did not hint at the existence of such a controversy, or that plaintiff claimed that any statute or law of the state of Colorado had deprived it or had authorized it to be deprived of its property without due process of law. Nor did the complaint state any facts logically indicating the existence of such a claim, or from which it could be by the most strained inference remotely deduced. When the amendment to the replication was filed, it made no allegation showing in fact the existence of such a claim on plaintiff's part, but presented only a bald, unsupported statement, that the Fourteenth Amendment had been sinned against. This condition of the record is, under repeated decisions of this court, utterly insufficient to import such a question into it or the case, or to authorize the case to be brought upon writ of error to this court for review. Mere assertion, anywhere in the record, would be futile to confer jurisdiction. The Fourteenth Amendment is expressly directed against the state, and not against individuals; against the injustice, for which the law makes provision, not

against the misapplication or misinterpretation of the law by the courts or its violation by individuals.

Kiernan vs. Multnomah Co., 95 Fed., 849.
In re Ah Lee, 5 Fed., 899.

No tenable or plausible contention against the statute in Colorado has been or can be presented. No claim can be colorably made that it violated the Constitution of the United States. No decision by the trial court was had so indicating. The record does not present or touch upon such questions, and the case was therefore not within the class reviewable here, contains no justification for being brought here, and, we submit, may not be entertained by this court. If a mere assertion in a pleading or brief, or at the trial, would compel this court to take jurisdiction, then the existence or non-existence of its jurisdiction would depend upon and be determined, not by the Circuit Court, which we have shown herein, by decisions of this court, could not be done, but by the litigant or his counsel, who would be enabled, by a mere assertion in the pleading, made in good or bad faith, plausible or without color or excuse, wholly without support in fact, to secure audience here, and in effect repeal the statutes which have sought to afford this court relief from the ever-increasing flood of appeals and writs of error which poured in upon it.

We assert that neither the application nor the construction of the Fourteenth Amendment is in any manner involved in the cause, and, as above urged, that the assertion of the pleader to that effect can not import the question into the record. Were it otherwise, in addition to grounds against this claim above

presented, "every case," in the language of the chief justice,

> "arising under the laws of the United States, might be said to involve the construction or application of the Constitution or the validity of such laws."

It is a principle of pleading, much older than the act of 1891, that any averment which is a legal conclusion can not operate to the prejudice of anyone, unless the conclusion be well founded, and this is especially true when jurisdiction is sought to be thereby sustained.

> New Jersey R. R. Co. vs. Mills, 113 U. S., 257.
>
> Metcalf vs. Watertown, 128 U. S., 536.

> "The only reference to the Constitution or laws of the United States is the suggestion that the defendants will contend that the law of the state under which the plaintiffs claim is void, because in contravention of the Constitution of the United States; and by the settled law of this court, as appears from the decisions above cited, a suggestion from one party that the other will or may set up a claim under the Constitution or laws of the United States does not make the suit one arising under that Constitution or those laws."
>
> Tennessee vs. Union Bank, 152 U. S., 454.

This is but saying, in effect, that, in order to make a case one arising under the Constitution or laws of the United States, an issue must be directly presented, involving such construction, which issue must of itself be conclusive of the case.

Gold Washing Co. vs. Keyes, 96 U. S., 199.

Railroad Co. vs. Amato, 144 U. S., 465.

Western Union Co. vs. Railroad Co., 178 U. S., 239.

Chapin vs. Frye, 179 U. S., 127.

In Ansbro vs. U. S., 159 U. S., 695, it was said that a case involved the construction or application of the federal Constitution when a right, title, privilege or immunity is claimed under that instrument, but a definite issue in respect to the possession of the right must be distinctly deducible from the record, before the judgment of the court below can be revised on the ground of error in the disposal of such a claim by its decision. This principle was enforced in

Cornell vs. Green, 163 U. S., 75;

Muse vs. Arlington Hotel Co., 168 U. S., 430,

both being on error direct to the trial court.

Western Union Co. vs. Ann Arbor Co., 178 U. S., 239, originally brought in the state court, was removed to the Circuit Court of the United States by the defendant on an averment that the suit arose under the Constitution and laws of the United States. Whether it did so arise depended, said the court, on complainant's own statement of the case. It did not there so appear, and the jurisdiction of the Circuit

Court was denied, although there was a diversity of citizenship, whereby the plaintiff might have originally brought its suit there.

Arkansas vs. Schlierholz, 179 U. S., 598.

The principle of these cases, when applied to the record before the court, reveals the fact that the claim of construction or application of the Fourteenth Amendment to the rights asserted by the plaintiff is not even colorable. As stated in the amended replication, and in the objections interposed to the defendant's offer of proof, it complained that it was deprived of its property without notice, hearing, or opportunity to be heard, or due process of law, and in violation of the Fourteenth Amendment. This allegation was, it must be assumed, aimed at the judgments of the state courts forming the basis of our title as judgments in personam.

There were involved, and are now, involved in this case, only questions of general law and of fact, and these do not authorize the case in which they are presented to be brought to this court for review.

We think it can be safely asserted that a case is not presented involving a construction of the Constitution of the United States when in the trial of a cause in the Circuit Court, a prior judgment of a state court, or of another federal court, is offered in evidence, and is objected to on the ground that the court which rendered the first judgment did not have jurisdiction to render the same because the question of the validity of the original judgment is one of general law. It is only in the case itself that the applica-

tion or construction of the Constitution or of the federal laws can be involved.

Chouteau vs. Gibson, 111 U. S., 205.

California vs. Holiday, 159 U. S., 415.

Spencer vs. Duplau Co., 24 S. C. Reporter, 174.

Defiance Water Co. vs. Defiance, 24 S. C. Reporter, 63.

San Francisco vs. Itsell, 133 U. S., 65.

Anglo-American Co. vs. Davis Co., 24 S. C. Reporter, 93.

In Carey vs. Houston Railway Co., 150 U. S., 170, 181, the court says:

> "It is argued that the record shows that complainants had been deprived of their property without due process of law, by means of a decree attached, but because the bill alleged irregularities, errors and jurisdictional defects in the foreclosure proceedings and fraud in respect thereof, and in the subsequent transactions which might have enabled the Railroad Company upon a direct appeal to have avoided the decree of sale, or which, if sustained on this bill, might have justified the Circuit Court in setting aside that decree, it does not follow that the construction or application of the Constitution was involved in the sense of the statute."

See, also:

Carey vs. Houston Co., 161 U. S., 115.
Iowa vs. Rood, 187 U. S., 87.
Hooker vs. Los Angeles, 188 U. S., 314.

The plaintiff's attack upon the Ouray County and District Court's judgments are merely that they were void for want of jurisdiction of the person, and, that being a proposition of general jurisprudence, does not involve the application or construction of the federal Constitution. If it were otherwise, counsel might insert an appropriate allegation into the pleadings in every conceivable case, and by that means invest this court with general jurisdiction of all controversies.

The questions of law and fact which control in this case, and must determine the decision thereof, are in no sense federal in their nature or their origin, much less are they, even incidentally, concerned with the Fourteenth Amendment to the Constitution of the United States, or present the frailest support for invoking its protection. After the fullest and most searching investigation of the case and the record, it must be decided upon these questions of law and fact, without a reference or allusion to the application of any provision of the Constitution of the United States, or of any federal statute. Hence, this court is without jurisdiction to consider the case upon its merits or to go further than to find that the writ should not have been brought to this court, and for that reason to dismiss it.

The record may be summarized, and the questions of law and fact involved in the case, and the decisions of this court which are controlling and decisive with

reference thereto as to the judgments and sales thereunder in controversy herein, may be briefly presented as follows:

The plaintiff was organized as a corporation under the laws of Maine, for the purpose of acquiring, owning, holding and operating mining property in the state of Colorado. It came to Colorado, where it found in existence a statute requiring a foreign corporation, before it was authorized to do business in this state, to file its articles of incorporation with the secretary of state and with the clerk and recorder of the county in which its chief office would be, to designate its principal place of business, and to appoint an authorized agent upon whom service of process could be had, which appointment or authorization should be filed with the secretary of state and the clerk and recorder of the county in which it designated its principal office to be located. This was done. The articles were filed, as required, and the agent, Mr. Jardine, designated. No designation of the period for which he should be the agent of the company was made. He was never removed from his position, but changed his residence, giving the utmost force to the contention of the plaintiff, from Ouray, in Ouray county, to Telluride, in San Miguel county, where he was nearer to the mines than at Ouray. The plaintiff had conveyed to it the property here in question, situated in Ouray county, and continued in the ownership from that time until divested thereof by the judgments and sales thereunder under consideration in this case. While thus owning and operating these properties, it became indebted to the several plaintiffs in the actions in the County Court, all of whom were citizens and residents

of the state of Colorado, doing business in Ouray county, and all furnished supplies for or did work upon the property here in controversy. While thus indebted to the several plaintiffs in these actions, and retaining the property it had acquired, with its authorized agent unremoved, still residing within the state, it was sued in attachment by the several plaintiffs, the property herein levied upon, process served upon Mr. Jardine, judgments based thereon regularly entered, sale had of the property, conveyance thereof made, and by mesne conveyances it passed to the defendant.

The following references to the transcript will sustain this view:

Cosmopolitan Co. Organized June 26, 1884. (Foreign Corporation, page 27, folio 55.)

Appointed Jardine process agent, "in compliance with requirements laws of Colorado," December 16, 1885. (Page 32, folio 64.)

Ashenfelter vs. Company. Attachment, Ouray County Court. Suit begun May 21, 1895. For work done between June 1 and December 1, 1894. (Page 59, folio 107.)

Bond in attachment, signed by plaintiff as resident of Ouray county. (Page 59, folio 108.)

Begole Company vs. Cosmopolitan Company. Attachment, County Court, April 26, 1895. Plaintiff corporation under laws of Colorado. Also assignee of San Juan Hardware Company's account, said company being Colorado corporation. (Page 66, folio 118.)

Action for goods sold to defendant between May 8 and July 24, 1894.

P. H. Fennell vs. Cosmopolitan Company. Action begun May 23, 1895, to recover for work done by

himself and one Dowd for the defendant, at its request, prior to August, 1894. (Page 76, folio 131.)

Fulton vs. Cosmopolitan Company. Commenced May 23, 1895, for work done for defendant by John Lillar prior to November 4, 1893. Claim assigned to plaintiff; signs bond as resident of Colorado. (Pages 85-6, folios 144-7.)

Summons served on Jardine as agent, May 7th, May 23d, May 27th and June 23d, respectively. (Page 61, folio 110; page 69, folio 12; page 79, folio 136; page 89, folio 150.)

The questions are: Was Mr. Jardine an agent upon whom service might be had under this condition of affairs? Was he not appointed for the very purpose of enabling the citizens and residents of Colorado, who became the creditors of the plaintiff, to sue it and secure the payment of their debts? Did the transit of Jardine, across the imaginary line separating San Miguel and Ouray counties, divest him of authority, take away the opportunity sought to be secured by the statute to the citizens of Colorado to enforce their claims in the jurisdiction wherein they were created, and render it impossible to obtain judgment therefor against the plaintiff; in brief, annul the statute, and render The Cosmopolitan Mining Company immune against the service of process and the collection of debts, while it yet retained its property and was in position to do just as it chose therewith?

The facts above narrated appear, directly and indirectly, clearly by the record and the portions thereof to which we have above referred. We contend that this court has, by unmistakable decisions, held that,

under circumstances above set forth, the court had jurisdiction by virtue of the service upon Jardine, and the judgments were therefore valid, and the very object of the statute requiring the designation of an authorized agent necessarily authorized these proceedings. We call attention only to the recent decisions, which are so direct, conclusive and thoroughly just that they need no reinforcement or multiplication of decisions from other jurisdictions.

Mutual Reserve Fund Life Association vs. Phelps, 190 U. S., 147.

In addition to holding that the cancellation of the right of the company to do business in Kentucky did not take away the right of those with whom it had done business to serve process upon the insurance commissioner, the court discusses and decides the purpose of the designation of an authorized agent, the duration of his office, and the rights of creditor citizens of the state in which the corporation has become domiciled to obtain service upon such authorized agent in the enforcement of their claims, Mr. Justice Brewer saying:

> "Many questions were elaborately discussed by counsel, both orally and in brief, but we are of the opinion that the decisions of two or three will dispose of the case. First, the service of summons on the insurance commissioner was sufficient to bring the association into the state court as party defendant. It was stipulated between the parties that the outstanding policies existing between the association and citizens of Ken-

tucky were continued in force after the action of the insurance commissioner on October 10, 1899, and that on said policies the association had collected and was collecting premiums and assessments. It was therefore doing business within the state. Connecticut Mutual L. Ins. Co. vs. Spratley, 172 U. S., 602."

But especially do we call attention to the following portion of the opinion, as peculiarly applicable to and decisive of the case presented in the court below, quoting first from the decision of the Court of Appeals of Kentucky, in Home Benefit Society vs. Muehl, 22 Ky. L. Rep., 1378; 59 S. W., 520, to this effect:

> "It is sufficient to say that the agency created by the act of 1893 is, in its terms, broader than that created by the act of 1870. The words of the later statute express no limitation. Whatever limitation shall be applied to it must be by implication. And, when we consider the purpose of the act, it becomes clear that it would be frustrated by the construction contended for. There is no need of the right to serve process upon the insurance commissioner so long as the company has agents in the state, and we think the purpose of the section was to provide a means of obtaining service of process upon foreign companies which no longer had agents in the state upon whom process might be served in suits upon contracts made in this state, whatever may be held as to suits upon contracts entered into elsewhere."

Mr. Justice Brewer, following this quotation, says:

"Such decision of the highest court of Kentucky, construing one of its own statutes, if not controlling upon this court, is very persuasive, and it certainly is controlling, unless it be held to be merely an interpretation of a contract created by the statute. As an original question, and independently of any expression on the part of the Court of Appeals, we are of the opinion that such is the true construction. This and other kindred statutes enacted in various states indicate the purpose of the state that foreign corporations engaging in business within its limits shall submit controversies growing out of that business to its courts, and not compel a citizen having such a controversy to seek the state in which the corporation has its home for the purpose of enforcing his claims. Many of those statutes simply provided that the foreign corporation should name some person or persons upon whom service of process could be made. The insufficiency of such provision is evident, for the death or removal of the agent from the state leaves the corporation without any person upon whom process can be served. In order to remedy this defect some states, Kentucky among the number, have passed statutes, like the one before us, providing that the corporation shall consent that service may be made upon a permanent

official of the state, so that the death, removal or change of officer will not put the corporation beyond the reach of the process of the courts. It would obviously thwart this purpose if this association, having made, as the testimony shows it had made, a multitude of contracts with citizens of Kentucky, should be enabled, by simply withdrawing the authority it had given to the insurance commissioner, to compel all these parties to seek the courts of New York for the enforcement of their claims. It is true in this case the association did not voluntarily withdraw from the state, but was in effect by the state prevented from engaging in any new business. Why this was done is not shown. It must be presumed to have been for some good and sufficient reason, and it would be a harsh construction of the statute that, because the state had been constrained to compel the association to desist from engaging in any further business, it also deprived its citizens, who had dealt with the association, of the right to obtain relief in its courts. We conclude, therefore, that the service of summons on the insurance commissioner was sufficient to bring the association into the state court, and, there being nothing else to impeach the judgment, it must be considered as valid."

In short, that the object of the requirement in the statutes of the states, that some one should be designated as an authorized agent upon whom service of process should be made, was intended to se-

cure to the citizens of the state to whom the company had become indebted, the right to proceed in that jurisdiction to enforce their claims, even if the company rightfully or wrongfully ceased to do business, or was compelled to desist therefrom while it was yet indebted to citizens of the state. This right is as important and necessary to each individual creditor, or to a single creditor, as to a great number. The right is as well secured, though more precarious in its nature, when the person to be served is an authorized agent, as when he is a permanent official. If the right of the citizen can not be taken away by the act of the state in compelling the company to desist from doing business, it can not be taken away by the voluntary moving of a designated agent from one county to another. In the consideration and determination of this question, it is seen at a glance that no claim concerning the infringement of the Fourteenth Amendment by the state statute is made; that the federal Constitution has not even been glanced at in its determination; that general and far-reaching principles of law, long settled and well established, are applied to a new condition, and that, therefore, in fact, the question of the state having violated prohibitions and restrictions of the Fourteenth Amendment has never arisen.

The cases of Loeb vs. Columbia Township, 179 U. S., 472, and Holder vs. Altman, 169 U. S., 81, are relied on as sustaining the jurisdiction of this court. In those cases the constitutionality of a statute as affecting the rights of the defendant was challenged *bona fide*, and in each instance the challenge was by the trial court sustained. The defeated litigant sued

out a writ of error from this court under section 5 of the act of 1891 to the trial court, and the jurisdiction of the court was sustained. But here we contend that there is no such condition. The claim of plaintiff that the Fourteenth Amendment is applicable to the controversy is not justified by a solitary fact in the record. As well might it claim the application or construction of the Fifteenth Amendment.

> "A definite issue in respect to the possession of the right must be distinctly deducible from the record before the judgment of the court below can be revised on the ground of error in the disposal of such a claim by its decision. And it is only when the constitutionality of a law of the United States is drawn in question, not incidentally, but necessarily and directly, that our jurisdiction can be invoked for that reason."
>
> Cornell vs. Green, 163 U. S., 80.

> "The words of the statute which empower this court to review directly the action of the Circuit Court are that such power shall exist whenever it is claimed on the record that a law of a state is in contravention of the federal Constitution. Of course, the claim must be real and colorable, not fictitious and fraudulent."
>
> Penn Co. vs. Austin, 168 U. S., 695.

"Due process of law" was essential to the validity of a personal judgment long before the Fourteenth Amendment was enacted. It was a part of that law

of the land guaranteed by Magna Charta, which neither legislature nor courts might disregard. If the judgments assailed are void, it is not because of the operation of the Fourteenth Amendment, but because the plaintiff in error was denied the benefit of the rights vouchsafed by the law of the land. Mr. Webster defined this phrase in the Dartmouth College case, and it was "intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice."

Bank of Columbia vs. Okeley, 4 Wheat., 235.

The requirement imposed by due process of law may be found in the Constitution of every state in the Union. Mr. Justice Field well said, in Pennoyer vs. Neff, that in all the cases brought in the state and federal courts, when attempts were made to give effect to personal judgments without service of process, they were held to be without binding force. At the same time he fully recognized the right of a state to authorize proceedings to determine the status of one of its citizens toward non-residents, and to require non-residents doing business in and making contracts within its borders to appoint representatives to receive service of process therein. If questions like those presented in the case at bar involve the construction or application of the Fourteenth Amendment, it is difficult to imagine any limitation to the power of litigants to invoke the jurisdiction of the Circuit Courts of the United States, or to review their judgments in this court. The act of 1891 will prove unavailing to re-

lieve this tribunal of its burdens, and the dockets of the Circuit Court of Appeals will become too slender to require great attention.

Respectfully submitted,

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12150

Supreme Court of the United States.

No. 134.—October Term, 1903.

Cosmopolitan Mining Company, Plaintiff in Error, *vs.* Thomas F. Walsh.	In error to the Circuit Court of the United States for the District of Colorado.

[March 21, 1904.]

The Cosmopolitan Mining Company was incorporated under the laws of the State of Maine in June, 1884, for the purposes of "buying, selling, leasing, working, developing and improving gold, silver, copper or other mines, and purchasing and holding such other property as may be necessary or convenient." Soon after such incorporation the mining company —as we shall hereafter call the plaintiff in error—became the owner of mining claims, consisting of lodes and millsites, situated in the county of Ouray, Colorado.

The constitution of Colorado (art. XV, sec. 10) provided that "no foreign corporation shall do any business in this State without one or more known places of business, and an authorized agent or agents in the same upon whom process may be served." The statutes of the State required that before a foreign corporation should be permitted to do any business in Colorado it should make a certificate, signed by its president and secretary, duly acknowledged, and file the same with the Secretary of State and in the office of the recorder of deeds in each county in which business was to be carried on, designating the principal place where the business of such corporation was to be conducted in the State, and also naming an authorized agent or agents in the State, residing in the principal place of business of the corporation, upon whom process might be served. (Mills' Ann. Stat. sec. 499.) In compliance with the foregoing requirements the mining company filed on February 10, 1886, a certificate in the office of the Secretary of State of Colorado and in the office of each of the recorders of Ouray and Cumberland Counties, designating the county of Ouray as the principal place where the business of the corporation was to be carried on, and naming J. M. Jardine as the agent upon whom process might be served.

In the months of April and May, 1895, actions were brought in the county court of Ouray County by the A. W. Begole Mercantile Company, John Ashenfelter, P. H. Fennell and William C. Fulton, to recover from the mining company sums aggregating about $1,250, alleged to be due

for labor performed and merchandise furnished to the mining company in the State of Colorado in the years 1893 and 1894. In each complaint it was alleged that the mining company was a corporation "duly incorporated and organized under and by virtue of the laws of the State of Maine, with its principal office in the State of Colorado, in the city of Ouray, in said Ouray County." The Begole action was first instituted, and an attachment was issued and levied upon the real property of the mining company in Ouray County, being the mining claims heretofore referred to. In the complaints in the Ashenfelter and Fennell actions the fact of the levy of an attachment in the Begole case was recited, and the court was asked to make Ashenfelter and Fennell parties plaintiff in that action, and to give them like remedies against the mining company "as the law gives to the original plaintiff in said action." Writs of attachment were also issued in the Ashenfelter and Fennell actions, and were levied in the same manner as was the writ of attachment in the Begole case. In each of the three actions last referred to a copy of the writ of attachment and of the summons and complaint were served in San Miguel County, Colorado, upon J. M. Jardine, described in the return of the sheriff as the "duly authorized agent for the within-named company" (the Cosmopolitan Mining Company). The complaint in the Fulton case contained no reference to the levy of an attachment in the Begole action, and the plaintiff did not ask to be made a party to action. Although a writ of attachment was issued in the Fulton case, it was not shown to have been levied. A copy, however, of the writ as also of the summons and complaint, was served upon Jardine, described as in the returns in the other cases.

Judgments were entered in each of these county court actions, and in each judgment there was embodied an order "that the attachment herein be sustained, and a special execution issue." On the files, in the Begole action, was placed what was termed a "pro rating order," entitled in the Begole action, and therein was recited the recovery of judgments in the Ashenfelter, Fennell and Fulton actions, and that it appeared to the court that property belonging to the defendant company "was attached for the purpose of satisfying such judgments as might be obtained by the several plaintiffs against the said company." There was also contained therein direction to the sheriff of Ouray County "to sell the above described property or so much thereof as shall be necessary to satisfy said several judgments, together with the costs and interest thereon." Special writs of execution were issued, and the attached property was sold to one J. C. Marsh, as trustee for the several judgment creditors. In each case it was stated on the return on the writ of execution that the particular judgment had been fully satisfied.

Marsh received a certificate of purchase, and afterwards assigned the same to Stephen A. Osborn, and on May 25, 1896 the period of redemp-

tion having expired, a sheriff's deed was executed and delivered to Osborn. On June 16, 1896, Osborn conveyed the property to Walsh, the defendant in error herein.

On March 1, 1897, Walsh brought an action against the mining company and Jardine in a District Court of Ouray County, Colorado, to quiet his title to the property thus acquired. It was alleged that the mining company was a corporation of the State of Maine, organized for the purpose, among others, of carrying on the mining business in the county of Ouray and State of Colorado, and that by certificate, dated December 16, 1885, and recorded January 21, 1886, Jardine had been "duly appointed as the authorized agent of the defendant company, upon whom process might be served." The proceedings in the Begole, Ashenfelter and Fennell actions were set forth, as also the acquisition by Walsh under the same title to the property in question. It was averred that the defendants claimed an interest in the property and it was prayed that they might be required to set up such claims, and that it might be adjudged that the defendants did not have any interest in the property. Return was made of service of the summons and complaint on Jardine individually, and on the mining company, "by delivering to John M. Jardine, the duly authorized agent of the defendant company, and designated by it as the person upon whom service would be served." Jardine filed a disclaimer of interest, and judgment was entered against the mining company by default. In that judgment it was recited that entry of the default of the mining company had been made "for the failure of the said defendant to plead as required by law, after due service of summons upon it in manner and form as by law provided;" that the plaintiff had been sworn as a witness in the case; and that the court had heard the testimony given by the plaintiff and inspected the records, deeds and documents offered in evidence. After next finding the facts to be as they were averred in the complaint of Walsh, the court decreed as follows:

"It is, therefore, considered, adjudged and decreed by the court that the said defendants have not, nor have either of them, any right, title, interest, claim or demand in or to any part of the premises above described, and that the pretended claim of the defendant, The Cosmopolitan Mining Company, in and to said premises is wholly without right or justification in law. That the plaintiff is the owner and in the possession of the premises and mining claims above described and entitled to the quiet and peaceable possession of said mining claims and each of them."

The present action was brought on November 3, 1900, in the Circuit Court of the United States for the District of Colorado by the mining company, to recover possession of the real property purported to have been sold under the judgments in the county court actions. Diversity of citizenship of the parties was alleged in the complaint, and the property in controversy was averred to exceed $2,000 in value. It was further charged

that the plaintiff had been ousted of the possession of the property claimed by it on May 25, 1896, the date of the sheriff's deed under the sales on execution. The answer contained a general denial, and special defenses, one of which set out the various proceedings in the county court actions brought by Begole *et al.* and the other proceedings by which title to the property in dispute was claimed to be vested in Walsh. The judgment rendered in the action to quiet title was also specially pleaded, and there were averments of facts alleged to constitute estoppel. A replication and amended replication were filed to this answer. It was alleged in substance that prior to the service made upon Jardine, in the actions referred to in the answer of Walsh, the mining company was not doing business in the State of Colorado, and that in those actions no service of process had been made upon it, hence the Colorado courts acted without jurisdiction, and consequently "the plaintiff has been and is being deprived of its property, viz: The property sought to be recovered in this action without notice, hearing, opportunity to be heard, or due process of law, and in violation of the Fourteenth Amendment to the Constitution of the United States."

The action was tried to a jury. The case in chief for the mining company consisted of documentary evidence, exhibiting title in the mining company to the property in controversy at the date of the alleged ouster. The evidence for the defendant consisted of a certified copy of the statutory designation of Jardine as agent of the mining company, the judgment records in the various actions relied upon, tax deeds covering two of the millsites enumerated in the complaint, and oral testimony. Objection was made to the admission in evidence of the judgment records substantially upon the following grounds: 1. That the records of the judgments in the county court actions did not on their face show the appointment of Jardine as the agent of the mining company, and therefore there was nothing in the records to show that service had been made upon a proper agent of the corporation. 2. That even if the fact of the statutory designation by the corporation of Jardine as its agent could be incorporated into the records and considered, as it was not shown that at the time of the service the corporation was doing business in the State, jurisdiction over the company was not acquired by the service upon Jardine. 3. That in any event, as the service of process in the county court actions had been had upon Jardine in another county than the one mentioned in the statutory appointment as the place of residence of Jardine, the service was void. 4. That as there was then no evidence of personal service on the corporation through its agent, the mere levy of a writ of attachment was insufficient to confer jurisdiction and to authorize the court to enter judgment and direct a sale of the attached property. These objections, it was insisted, established that the judgments recovered against the corporation were rendered without due

process of law and in violation of the Constitution of the United States. The offer of the judgment record in the action to quiet title was also objected to because it was not shown that the company was doing business in Colorado at the time of service of Jardine, and therefore the service on him was void, and further because the court in its judgment or decree did not purport to direct a conveyance but simply attempted by such judgment or decree to establish title. Treating the actions in the county court as being *in personam* and not *in rem*, the objections were finally overruled by the trial judge, and all the judgment records were admitted in evidence except the record in the Fulton case. The judgment records in the county court actions were admitted on the ground that it sufficiently appeared from the records that the mining corporation at the time the actions were brought was doing business in the State of Colorado. The record in the Fulton case was excluded because of a deficiency in this particular. The court admitted the records in the action to quiet title because it appeared that the mining company was alleged in the comp'aint not only to have been authorized to carry on business in the State of Colorado, but to have been formed for that purpose, and its appointment of a statutory agent was a consent to be served through such agent.

Following the introduction of these records and in support of the defense of estoppel, evidence was offered on behalf of the defendant tending to show the expenditure made by him in connection with the property subsequent to his acquisition of title, but the court held the same to be inadmissible.

In rebuttal, the plaintiff offered in evidence from the record in the Begole action a writing signed by Jardine, in effect notifying the court that he did not reside in Ouray County, and disclaiming being an agent of the mining company, and also asking the court to quash the service made on him of the summons and writ of attachment. The paper was not admitted in evidence and an exception was taken to its exclusion. Two witnesses were next examined on behalf of the mining company for the purpose of establishing that the company maintained no office and was not doing business in the county of Ouray at the time of the service of process in the actions referred to in the answer. No attempt, however, was made to prove that there had been an express revocation of the statutory designation of Jardine as agent to receive service of process. The testimony of the two witnesses above referred to tended to show that the mining company had never any established office in Ouray other than that of its statutory agent, while he resided in Ouray; that the mines of the company were situated some six or seven miles from Ouray, and had been worked up to a short time before the bringing of the actions which resulted in a sale of the property. But one witness—the sheriff of the county—testified concerning the operation of the mines, and he was not shown to possess definite knowledge as to when operations ceased. No testimony was introduced to show

whether the suspension of operations, if entire, was intended to be permanent or was merely temporary. The court overruled a motion on behalf of the defendant to strike out the testimony of these witnesses, but in doing so observed that it would instruct in view of the testimony.

Thereupon counsel for the plaintiff asked the court to direct the jury to find for the plaintiff except as to two millsites which were covered by tax deeds to Walsh, and to the overruling of this motion the mining company excepted. The court then of its own motion instructed the jury as follows:

"Gentlemen of the Jury: In the view the court takes of this case, it becomes a question of law, and the court will instruct you to find a verdict in favor of the defendant and that the defendant is entitled to possession of the demanded premises."

On the verdict, and after overruling a motion for a new trial, judgment was entered. A writ of error from this court was thereupon allowed by the trial judge, who made and signed a certificate reciting "that in the pleadings in this action as well as in the rulings of this court in admitting and refusing to admit evidence, and in giving and refusing to give instructions to the jury as set forth in the assignment of errors hereto annexed, there were involved the application and construction of the Constitution of the United States, viz., of the part of the Fourteenth Amendment to the same which provides for due process of law."

Mr. Justice WHITE, after making the foregoing statement, delivered the opinion of the Court.

We are asked in this case to review directly the judgment of a Circuit Court of the United States, and our right to do so, if at all, depends on that clause of section 5 of the Judiciary Act of 1891, which authorizes the taking of appeals or writs of error from District or Circuit Courts direct to this court "in any case that involves the construction or application of the Constitution of the United States." Of course, if the case at bar does not really involve the construction or application of the Constitution of the United States, in the sense in which that phrase is employed in the Judiciary Act of 1891, we are precluded from examining the merits upon this writ of error. In order to determine whether the case is one which should have gone to the Circuit Court of Appeals and not have been brought directly to this court, we must look into the record, without regard to the certificate given by the trial judge. Indeed, we know of no authority for the making of such certificate.

Before coming to the record, however, we shall briefly advert to the legal principles which must control.

In *Carey* v. *Texas Central Ry.*, (150 U. S. 170,) the record exhibited the following controversy: Stockholders of the railway company filed a

bill in equity in a Circuit Court of the United States, praying, among other relief, the setting aside of a certain decree of foreclosure and sale, basing the claim upon the grounds of collusion and fraud and want of jurisdiction in the court which had entered the decree. A final decree was entered in the cause dismissing the bill and appeals were allowed both to the Circuit Court of Appeals and to this court. The appeal to this court was based upon the contention that the cause involved not only the question of the jurisdiction of the court below, but also the question of the construction or application of the Constitution of the United States. The appeal was dismissed, and in the course of the opinion, speaking through Mr. Chief Justice Fuller, it was said (pp. 179, 181):

"The Judiciary Act of March 3, 1891, in distributing the appellate jurisdiction of the national judicial system between the Supreme Court and the Circuit Court of Appeals therein established, designated the classes of cases in respect of which each of these courts was to have final jurisdiction, (the judgments of the latter being subject to the supervisory power of this court through the writ of certiorari as provided,) and the act has uniformly been so construed and applied as to promote its general and manifest purpose of lessening the burden of litigation in this court.

* * * * * *

"It is argued that the record shows that complainants had been deprived of their property without due process of law, by means of the decree attacked, but because the bill alleged irregularities, errors and jurisdictional defects in the foreclosure proceedings, and fraud in respect thereof and in the subsequent transactions, which might have enabled the railroad company upon a direct appeal to have avoided the decree of sale, or which, if sustained on this bill, might have justified the Circuit Court in setting aside that decree, it does not follow that the construction or application of the Constitution of the United States was involved in the case in the sense of the statute. In passing upon the validity of that decree the Circuit Court decided no question of the construction or the application of the Constitution, and, as we have said, no such question was raised for its consideration. Our conclusion is that the motion to dismiss the appeal must be sustained."

In re Lennon, decided at the same term, (150 U. S. 393,) the construction given in the Carey case to the provisions of section 5 of the Judiciary Act of 1891 was reiterated. In that case an appeal had been taken directly to this court from an order of the Circuit Court of the United States denying an application for a writ of *habeas corpus* sued out to obtain relief from an imprisonment upon a conviction for contempt. The jurisdiction of the committing court over the cause in which the order of commitment had been made, as well as over the person of the party sentenced for contempt, was assailed. The direct appeal to this court, however, was dismissed for want of jurisdiction. After pointing out that the objection for want of jurisdiction in the court below was without any foundation, the court, speaking through Mr. Chief Justice Fuller, said (p. 400):

"Nor can the attempt be successfully made to bring the case within the class of cases in which the construction or application of the Constitution is involved in the sense of the statute, on the contention that the petitioner was deprived of his liberty without due process of law. The petition does not proceed on any such theory, but entirely on the ground of want of jurisdiction in the prior case over the subject matter and over the person of petitioner, in respect of inquiry into which the jurisdiction of the Circuit Court was sought. If, in the opinion of that court, the restraining order had been absolutely void, or the petitioner were not bound by it, he would have been discharged, not because he would otherwise be deprived of due process, but because of the invalidity of the proceedings for want of jurisdiction. The opinion of the Circuit Court was that jurisdiction in the prior suit and proceedings existed, and the discharge was refused, but an appeal from that judgment directly to this court would not, therefore, lie on the ground that the application of the Constitution was involved as a consequence of an alleged erroneous determination of the questions actually put in issue by the petitioner."

It is obvious, under the construction of the Judiciary Act of 1891, announced in the cases just referred to, that this cause does not involve the construction or application of the Constitution of the United States, and therefore was not entitled to be brought directly to this court from the Circuit Court of the United States. When the proceedings at the trial are taken into view it is clear that the contentions which were urged did not require the construction of the Constitution of the United States, but simply called for the construction of the constitution and laws of the State of Colorado or the application of the principles of general law. The real contention of the mining company was that under the laws of Colorado it was essential to the legality of the service upon its alleged agent that the corporation when the service was made should have been doing business within the State, and that the agent should have been resident within the county named in the appointment as his place of residence. It was not disputed that, as authorized by its charter, the mining company had bought mines within the State of Colorado; that it had thereafter appointed, as required by the laws of Colorado, an agent within the State upon whom service of process might be made, and that there had been no direct revocation of such agency. Moreover, it was not disputed that the mining company had worked the mines in question up to a short time before the bringing of the actions in the county court of Ouray County, and that the liabilities enforced in those actions were contracted in Colorado and grew out of the operation of the mines in question. No evidence was introduced tending to show that the company had permanently ceased the operation of its mines in Colorado and withdrawn from that State; and the undisputed fact was that when the county court actions were brought it still owned the property which it had acquired as authorized by its charter.

No claim was made that the sale of the property under the executions in the county court actions was void under the Constitution of the United

States because wanting in due process of law, if the service on the agent was valid under the law of Colorado or the principles of general law applicable to the facts disclosed at the trial. The primary and fundamental contention of the mining company was therefore this and nothing more: that under the circumstances disclosed the service upon the statutory agent was unauthorized either by the law of Colorado or the principles of general law; and hence that it had not lost its title to the property. The claim asserted under the Constitution of the United States was, therefore, merely conjectural and amounted to this only, that if under the law of Colorado or under the general law the service on the alleged agent was void, that it would be a violation of the Constitution of the United States to give effect to judgments based on such service. Not only the statement we have made from the record, but the argument at bar, makes this a demonstration. Thus, in the discussion at bar, it was stated that it was not claimed that the State of Colorado could not without a violation of the Constitution of the United States have exacted that the authority conferred by a foreign corporation upon an agent to receive service of process should continue for the purpose of the enforcement of obligations contracted by the corporation, although the corporation had ceased to do business within the State, but that as the Colorado law when properly construed did not so provide, therefore the service was invalid, and the sale of the property of the mining company based on such service was void. This, however, as we have already shown, amounts but to the concession that the substantial controversy which the case presented involved the mere determination of what was the law of Colorado on the subject. The rulings of the court below as to the admissibility of evidence and its final direction of a verdict involved necessarily deciding that the service upon the agent was valid by the law of Colorado, or the principles of general law applicable thereto, and its action in so doing in nowise involved the construction or application of any provision of the Constitution of the United States.

Writ of error dismissed.

Mr. Justice BREWER is of opinion that this court has jurisdiction, that the judgment of the Circuit Court was right, and should be affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.